



# **The Legislative Complexities of Municipal Property Transactions in the Context of Social Value Creation**

Minor dissertation submitted to the Department of Construction Economics and Management (Faculty of Engineering and the Built Environment) in partial fulfilment of the requirements for the degree of Master of Science in Property Studies

by

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“Local government must be allowed to “govern its own initiative” and use its powers creatively to respond to the needs of its communities, without the risk of its powers being trampled by empowering legislation.”

**Former Chief Justice Pius Langa “The constitutionalisation of local government” *Local Government Bulletin* (1 July 2008) 23.**

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## **Abstract**

Legislation governing the sale and lease of immovable property by South African municipalities to third parties is extensive and multi-faceted. Different pieces of legislation are applicable, which specify several requirements to be complied with before a municipality enters into a sale or lease transaction. Compliance with some of these requirements are time-consuming and there are instances of overlap. While the requirements stipulate how a municipality should transact when undertaking immovable property transactions, consideration must also be given to overall municipal objectives and mandate, as provided for in the Constitution. The central theme of these objectives is the delivery of social value to the local community.

This dissertation aims to determine to what extent legislative requirements applicable to the sale and lease of municipal immovable property to third parties support the realisation of social value objectives, as provided for in the Constitution. The study has three main objectives:

- a. First, to identify the legislation applicable to municipal immovable property transactions and to determine the objectives of the legislation relating to municipal immovable property transactions.
- b. Second, to examine the extent to which social value objectives are achieved through municipal immovable property transactions.
- c. Third, to investigate whether the legislation and processes relating to municipal immovable property transactions may be improved to better facilitate social value delivery.

These objectives are considered by investigating and analysing the processes followed at two South African metropolitan municipalities when undertaking immovable property transactions. The study identifies and considers both the general challenges experienced by municipal officials regarding these transactions, as well as specific challenges faced in relation to the application of the legislation.

The study illustrates how the legislative requirements, aimed at providing fairness and transparency, may inadvertently discourage social value creation. Recommendations are made to streamline and simplify the transaction process.

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## Table of Abbreviations

GG	Government Gazette
GN	Government Notice
IDP	Integrated Development Plan
MATR	Municipal Asset Transfer Regulations to the Local Government: Municipal Finance Management Act 56 of 2003
MFMA	Local Government: Municipal Finance Management Act 56 of 2003
MSA	Local Government: Municipal Systems Act 32 of 2000
para(s)	Paragraph(s)
reg(s)	Regulation(s)
s(s)	Section(s)
SCMR	Supply Chain Management Regulations to the Local Government: Municipal Finance Management Act 56 of 2003

# Chapter 1: Introduction

## 1.1 Introduction

In South Africa, there are three spheres of government, namely, national, provincial, and local.<sup>1</sup> Municipalities fall within the local government sphere. Each sphere has its own functions, although they also overlap.<sup>2</sup> The Constitution empowers a municipality to undertake its functions autonomously.<sup>3</sup> In general, the terms “local government” and “municipality” are used interchangeably within the South African context. This is evident from several examples in legislation.<sup>4</sup> Where either of these terms is used within this dissertation, it should be considered to have the same meaning.

The objectives of municipalities are set out in section 152 of the Constitution. The objectives include operating in a democratic and accountable manner to the benefit of the local community, the provision of services to the community, the promotion of social and economic development and the advancement of community involvement in local government operations.<sup>5</sup> These objectives reveal an overarching theme, which is the focus of this study – the delivery of social value to the community by municipalities.

The term “social value” considers the extent to which economic, social, and environmental well-being is advanced.<sup>6</sup> In essence, “social value” measures how

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<sup>1</sup> Constitution of the Republic of South Africa, 1996, s 40(1).

<sup>2</sup> Constitution, 1996, s 40(1); *Minister of Defence and Military Veterans v Thomas* 2016 1 SA 103 (CC) at para 14; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) at paras 35-37; *Uthukela District Municipality v President of the Republic of South Africa* 2003 1 SA 678 (CC) at paras 1-2; *CDA Boerdery (Edms) Bpk v The Nelson Mandela Metropolitan Municipality* 2007 4 SA 276 (SCA) at para 37.

<sup>3</sup> Constitution, 1996, ss 40(1) and 151; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* at para 126; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) at para 49.

<sup>4</sup> For example, chapter 7 of the Constitution is titled “Local Government”, section 151 of that chapter is titled “Status of municipalities” and it then goes on to state that the “local sphere of government consists of municipalities”. Other examples include the Local Government: Municipal Finance Management Act 56 of 2003 and the Local Government: Municipal Systems Act 32 of 2000.

<sup>5</sup> Constitution, 1996, s152.

<sup>6</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* (2021) 8.

activities impact social, economic, and environmental well-being.<sup>7</sup> In terms of the provisions of section 152 of the Constitution, municipalities are responsible for delivering social value at a local level, i.e., to the local community.

The delivery of social value is applicable to all aspects of municipal services.<sup>8</sup> This study focuses on social value delivery through municipal immovable property transactions, more specifically the sale and lease of municipal immovable property to third parties.

Municipalities in South Africa own immovable property in the form of numerous and significant portions of land, buildings and infrastructure, valued at billions of rands.<sup>9</sup> In the first instance, municipal immovable property must be utilised for delivery of municipal services.<sup>10</sup> In cases where the immovable property is surplus to these requirements, i.e. not required to perform basic municipal services, it may be sold or leased to third parties.<sup>11</sup> Municipalities deliver on their social value objectives when they provide municipal services to the community; the sale and leasing of surplus municipal land to third parties present additional opportunities to deliver on those objectives.

The terms "immovable property" and "real estate" are used interchangeably within the South African municipal context. Some municipalities refer to their relevant department as a real estate department, while others designate it as a property management department.<sup>12</sup> In this dissertation, where reference is made to either of the terms, they are considered to have the same meaning and simply illustrate difference in terminology used by the municipalities.

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<sup>7</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 8; Emerson J "The Blended Value Proposition: Integrating Social and Financial Returns" (2003) 45 *California Management Review* 35-51.

<sup>8</sup> Constitution, 1996, s 152(2).

<sup>9</sup> Guide to the Municipal Asset Transfer Regulations 2012 9.

<sup>10</sup> Steytler N & De Visser J *Local Government Law of South Africa* (RS 14 2021) 11A-6.

<sup>11</sup> Municipal Finance Management Act, s 14(6); Steytler & De Visser *Local Government Law* 11A-4.

<sup>12</sup> For example, the City of Cape Town uses the term Property Management Department while eThekweni Municipality refers to the function as that of the Real Estate Department.

Under South African law, the term “property” includes both moveable and immovable property.<sup>13</sup> Land is considered to be immovable property and includes any permanent structures fixed to the land.<sup>14</sup> As the focus of this dissertation is on immovable property, the term “property” should be understood to refer to immovable property only.

Municipal property transactions in South Africa are governed by extensive legislation,<sup>15</sup> which specifies processes to be followed prior to the sale and lease of immovable property by local government to third parties. The comprehensive legislation and oversight measures aim to ensure transparency and prevent corruption.<sup>16</sup> However, there should be a balance between these protective measures and allowing for optimal delivery of social value through municipal transactions. The lengthy and complex legislative processes to be undertaken prior to the sale and lease of municipal immovable property could potentially delay or hinder delivery of important services. This would result in the opposite effect of its intended aim, discouraging the improvement of social value delivery.

## 1.2 Background

Prior to the implementation of the Interim Constitution,<sup>17</sup> municipalities were entirely answerable to national and provincial government.<sup>18</sup> The Interim Constitution and Final Constitution<sup>19</sup> brought significant changes to the historical structure of municipal subordination. They realigned the three spheres of government and placed local government alongside the national and provincial government spheres.<sup>20</sup>

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<sup>13</sup> Badenhorst P, Freedman W, Mostert H, Pienaar J & Van Wyk J *The Principles of the Law of Property in South Africa* 2 ed (2020) 36.

<sup>14</sup> Badenhorst et al *The Law of Property* 35 and 173-180; Muller G, Brits R, Boggenpoel Z & Pienaar J *Silberberg and Schoeman's: The Law of Property* 6 ed (2019) 3.

<sup>15</sup> Local Government: Municipal Finance Management Act; Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008]; Local Government: Municipal Systems Act.

<sup>16</sup> Kaganova O "Government Property Assets in the Wake of the Dual Crisis in Public Finance" (2010) 35(3) *Real Estate Issues* 31.

<sup>17</sup> Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>18</sup> *City of Cape Town v Robertson* 2005 2 SA 323 (CC); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*; *CDA Boerdery (Edms) Bpk v The Nelson Mandela Metropolitan Municipality*; Steytler N & De Visser J "Local Government" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 1 2 ed 1 12-1.

<sup>19</sup> Constitution, 1996.

<sup>20</sup> Steytler & De Visser *Local Government Law* 11A-3.

### 1.2.1 Municipal Roles and Responsibilities

The realignment of the three spheres of government recognises municipalities' central role of development and service delivery to local communities as part of delivery of transformation.<sup>21</sup> Municipal services are critical as it is at a local level where inequality in provision of services to local communities, created by apartheid, can be best addressed.<sup>22</sup>

As discussed above, the Final Constitution,<sup>23</sup> tasks municipalities with service provision to communities and the promotion of social and economic development within the local community. Furthermore, the Local Government: Municipal Systems Act requires a municipality to undertake its functions through the promotion and exercise of development.<sup>24</sup> Development goes beyond financial gain to the community and encompasses social, economic, and environmental improvements as well.<sup>25</sup> As part of this role, a municipality is required to undertake immovable property transactions to the advantage and improvement of the local community.<sup>26</sup>

### 1.2.2 Municipalities' Role in Immovable Property Transactions

In the private sector, property is often viewed in terms of its financial value and profit delivery and with less consideration being given to the wider benefits to society.<sup>27</sup> In contrast, municipalities are tasked with the provision of services to communities and to promote social and economic development.<sup>28</sup> Therefore, public sector property management relates directly to delivering of strategic goals of local government. Consequently, it should be considered an area of interest requiring further development.<sup>29</sup> Given the inequalities still plaguing local communities in South Africa, the importance of social value creation, and the role that municipal immovable property transactions can play in its improvement, should not be underestimated.

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<sup>21</sup> Steytler & De Visser *Local Government Law* 1-27.

<sup>22</sup> Steytler & De Visser *Local Government Law* 1-8.

<sup>23</sup> Constitution, 1996, s 152.

<sup>24</sup> Local Government: Municipal Systems Act, s 11(3)(b) read with s 4(2)(g).

<sup>25</sup> Steytler & De Visser *Local Government Law* 1-27; Kaganova (2010) *Real Estate Issues*.

<sup>26</sup> Steytler & De Visser *Local Government Law* 11A-4.

<sup>27</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 16.

<sup>28</sup> Constitution, 1996, s 152.

<sup>29</sup> Kaganova (2010) *Real Estate Issues* 31-41.

Prior to the Interim Constitution, municipalities had to be specifically empowered to acquire and dispose of immovable property, which took the form of municipal ordinances.<sup>30</sup> Until the 1980s, approval for immovable property transactions was required from the provincial administrator.<sup>31</sup>

This changed significantly with the implementation of the Interim Constitution and Final Constitution, which granted exclusive powers to municipalities in certain key areas.<sup>32</sup> The sale and lease of municipal property are not specifically listed as key functional areas in the Constitution. However, it is addressed through section 156(5) of the Constitution, which provides that a municipality may implement any power that relates to an issue which is considered to be “*reasonably necessary for, or incidental to, the effective performance of its functions*”.<sup>33</sup> The disposal of immovable property is considered to fall within the scope of this power as it is directly linked to the delivery of municipal functions.<sup>34</sup>

This does not mean that municipalities have unfettered powers to sell and lease municipal assets. Transactions involving the sale and lease of municipal immovable property are subject to extensive legislation.<sup>35</sup> Navigating the legal landscape can therefore be challenging. Given that there are multiple legislative requirements applicable to these transactions, municipal property management practitioners may end up falling foul of meeting all of the necessary approval procedures. This in turn could lead to municipal decisions being challenged and set aside or an opportunity lapsing by the time the required approvals are finally obtained. As an example, a worthy social opportunity, such as a soup kitchen or rehabilitation centre, may be linked to donor funding timelines, and by the time that the necessary approvals have been obtained, the funding may no longer be available. As a result, vulnerable

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<sup>30</sup> Steytler & De Visser *Local Government Law* 11A-6.

<sup>31</sup> Steytler & De Visser *Local Government Law* 11A-4.

<sup>32</sup> Constitution, 1996, schedules 4 and 5; Steytler & De Visser *Local Government Law* 11A-4.

<sup>33</sup> Also see Steytler & De Visser *Local Government Law* 5-6; *eThekweni Municipality v Independent Schools Association of Southern Africa* 2022 1 All SA 17 (SCA) para 16; *City of Johannesburg Metropolitan Municipality v Zibi* 2021 3 All SA 667 (SCA) para 43.

<sup>34</sup> Steytler & De Visser *Local Government Law* 11A-4.

<sup>35</sup> For example, the Local Government: Municipal Finance Management Act, Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008] and Local Government: Municipal Systems Act.

members of the community lose out on social services due to onerous legislative requirements.

Third parties may be dissuaded from contracting with local government due to the complex process that they have to follow and the uncertainty of their success.<sup>36</sup> In addition, there appears to be a reluctance from local government to enter into public-private partnerships, in part at least due to the extensive legal requirements of the Municipal Systems Act and the Municipal Finance Management Act, which do not necessarily support local government's reliance on private funding.<sup>37</sup>

This study considers the legislative requirements applicable to municipal property management transactions and more specifically whether the legislation allows municipalities to deliver on their constitutional objectives, in particular social value creation. The focus of the study is on sale and lease transactions relating to municipal immovable property within South African municipalities.

### 1.3 Statement of the Problem

Municipal immovable property transactions, which include the sale and lease of local authority immovable property, are governed by extensive legislation.<sup>38</sup> The legislation does not necessarily have service delivery as its main objective.<sup>39</sup> As an example, the objective of the Municipal Finance Management Act is to regulate financial affairs of municipalities.<sup>40</sup> The legislation's focus on this objective, which brings with it the requirement of compliance with extensive financial procedures, may in turn lead to delayed service delivery.<sup>41</sup>

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<sup>36</sup> Abdullah S, Razak A, Hanafi M & Salleh M "Managing Government Property Assets: The main issues from the Malaysian perspective" (2011) 3 *Journal of Techno-Social* 35.

<sup>37</sup> Steytler N "The Financial Health of Municipalities" (2008) 10(5) *Local Government Bulletin* 128.

<sup>38</sup> For example, the Local Government: Municipal Finance Management Act; Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008]; Local Government: Municipal Systems Act; Preferential Procurement Framework Act 5 of 2000.

<sup>39</sup> Magni P *Strategic Spatial Planning's Role in Guiding Infrastructure Delivery in a Metropolitan Municipality Context: The Case of Johannesburg* 2013 unpublished paper presented at the Spatial Planning and Infrastructure 49th ISOCARP Congress on 1 October 2013.

<sup>40</sup> Local Government: Municipal Finance Management Act, s 2.

<sup>41</sup> Magni *Strategic Spatial Planning's Role in Guiding Infrastructure Delivery in a Metropolitan Municipality Context: The Case of Johannesburg* 2013.

Prior to the sale or lease of municipal immovable property, numerous parties, including provincial and national government, must first be consulted,<sup>42</sup> a public participation process<sup>43</sup> and a competitive procurement process, such as a tender or auction,<sup>44</sup> are required. Only in very specific and limited circumstances may direct transactions with a preselected third party be undertaken.<sup>45</sup> While additional legislative requirements may not always impact the success of local government property transactions, in some cases it will.<sup>46</sup> The question that arises is whether municipalities are able to effectively provide social value while acting within the confines of current legislation.

#### 1.4 Research Question

The main research question addressed in this study is: To what extent do legislative requirements applicable to the sale and lease of municipal immovable property to third parties support the realisation of social value objectives, as provided for in the Constitution?

#### 1.5 Aims and Objectives

The aim of this study is to determine whether social value objectives, as provided for in the Constitution, are achievable when implementing the legislation applicable to the sale and lease of municipal immovable property.

The study has three main objectives:

- First, to identify the legislation applicable to municipal immovable property transactions and to determine the objectives of such legislation.
- Second, to examine the extent to which social value objectives are met through municipal immovable property transactions.

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<sup>42</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], regs 6(b) and 35(b).

<sup>43</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], regs 6 and 34(1)(a).

<sup>44</sup> Local Government: Municipal Finance Management Act, s112(1).

<sup>45</sup> Local Government: Municipal Finance Management Act, s 113(2).

<sup>46</sup> Kaganova (2010) *Real Estate Issues* 31.

- Third, to investigate whether the legislation and processes relating to municipal immovable property transactions may be improved to better facilitate social value delivery.

## 1.6 Research Hypothesis

Municipal immovable property transactions do not provide optimal social value delivery, and this is a consequence of the complex and restrictive legislation applicable to these transactions.

## 1.7 Research Methodology

This study considers the legislation applicable to the sale and lease of municipal property to third parties in South Africa and evaluates to what extent the implementation thereof encourages the delivery of social value. To achieve the outlined research objectives, the research approach adopted for this study is qualitative as it has a flexible structure, which allows for an inductive research style.<sup>47</sup> The research design is a case study as this allows for analysis of a specific issue to generate more awareness of the topic.<sup>48</sup> A case study aims to investigate why an act occurred.<sup>49</sup> This approach requires a wide range of documentary evidence as well as information gathering through interviews.<sup>50</sup>

The study employs the following research methodology:

1. A critical literature review of the multiple pieces of legislation applicable to municipal immovable property transactions in South Africa. Case law relating to municipal immovable property decision making is also considered in order to assess challenges with implementation of the legislation. Both South African and international literature are analysed to establish the current approach in South Africa and how this compares to the approaches of other municipalities internationally. International literature is consulted to determine if there is the

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<sup>47</sup> Creswell J *Research Design: Qualitative, Quantitative and Mixed Method Approaches* 4 ed (2014) 32.

<sup>48</sup> Creswell J, Hanson W, Clark Plano V & Morales A "Qualitative Research Designs: Selection and Implementation" (2007) 35 *The Counseling Psychologist* 236 245.

<sup>49</sup> Creswell et al (2007) *The Counseling Psychologist* 245.

<sup>50</sup> Creswell et al (2007) *The Counseling Psychologist* 245.

potential for improvement in social value delivery within the South African context.

2. Data is collected in two case-study municipalities within South Africa, namely the City of Cape Town Municipality and eThekweni Municipality. The data is collected through:
  - a. semi-structured online interviews with officials from the two metropolitan municipalities who are involved with the sale and lease of municipal property to third parties; and
  - b. documentation relating to the process for undertaking the transactions identified in (a) above.
3. An analysis of the collected data is undertaken to determine to what extent legislation applicable to municipal sale and lease transactions involving third parties allows for the creation of social value.
4. Lastly, conclusions are drawn, and recommendations made.

## 1.8 Scope and Limitations of the Study

In South Africa, there are 278 municipalities, of which eight are classed as metropolitan, 44 as district and the remaining 226 are local municipalities. It is not possible to examine all of the South African municipalities in detail through a case study and the study will therefore be focussing on metropolitan municipalities given that they fulfil the entire spectrum of municipal functions.<sup>51</sup>

The study seeks to understand the challenges faced in relation to the navigation and implementation of immovable property legislation by municipal officials. Other issues that may impact municipal social value delivery, such as budgetary and capacity constraints, are not considered relevant for the purposes of this study and may skew the results. The study has therefore been limited to well-functioning metropolitan municipalities, with the necessary financial and human resources to implement legislation effectively. In selecting qualifying municipalities for inclusion in the study, the findings of the latest Auditor General report available at the time when participants

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<sup>51</sup> Steytler & De Visser *Local Government Law* 2-21.

were selected<sup>52</sup> were considered. Findings relating to qualified/unqualified audits, wasteful and irregular expenditure, as well as corruption were determining factors in the selection process.

To ensure that participants have a working knowledge of the subject matter, qualifying criteria included being employed at a senior level at the municipality with responsibility for undertaking sale and lease transactions on a regular basis.

As the study has been limited to well-functioning metropolitan municipalities, findings may not be generalisable to municipalities that are performing poorly. Other factors, such as poor management and lack of resources may also impact their service delivery. Limitations applicable to interview research apply.

## 1.9 Dissertation Structure

The dissertation consists of five chapters. Chapter 1 provides an introductory overview of the context and background of the research. It outlines the research question with reference to the problem statement, research aims and objectives. The chapter also briefly addresses the research methodology, scope, and limitations.

Chapter 2 contains a literature review which identifies the objectives and mandate of South African municipalities, as provided for in the Constitution, and examines the role of municipalities within the property environment. It considers local and international literature relating to municipal property transactions and social value creation. The chapter analyses the legislation applicable to municipal immovable property transactions in South Africa, with a focus on the sale and lease of municipal immovable properties to third parties. The chapter also considers South African case law relating to the implementation of municipal property transactions.

Chapter 3 focuses on the research methodology. It discusses the research approach and design and explains how the two case studies were selected. Finally, the chapter sets out the processes of data collection and analysis.

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<sup>52</sup> Auditor General of South Africa Consolidated General Report on Local Government Audit Outcomes MFMA 2020-21.

Chapter 4 presents the analysis and interpretation of the research data and includes a discussion of the research findings. The first section of the chapter considers general procedural challenges associated with the sale and lease of municipal property while the second part focusses on the legislative aspects.

Chapter 5 provides an overview of the dissertation findings and includes concluding remarks as well as recommendations relating to how social value delivery may be enhanced by municipalities through property transactions.

## Chapter 2: Literature Review

### 2.1 Introduction

In South Africa, municipal functions are mandated in terms of the Constitution and these functions include the provision of services to the local community.<sup>53</sup> The vehicle for delivery of these services is through the creation of social value within the local community. Municipalities own and manage significant portions of property within their administrative areas, which provides an opportunity for social value delivery.<sup>54</sup>

As the literature review illustrates, extensive legislation governs the sale and lease of municipal property in South Africa, and it has been applied with varied success, as is evidenced through the court cases discussed at the end of the chapter. This chapter firstly explores literature relating to municipal property transactions in the context social value creation, both locally and internationally. This is followed by an analysis of the applicable legislation and consideration of caselaw relating to municipal immovable property transactions in South Africa.

### 2.2 Municipal Immovable Property

The objective of local governments is to deliver services for the benefit of its community.<sup>55</sup> Municipalities generate funding through their own revenue sources (which include service charges, property rates and loans) and also rely on national funding for provision of services.<sup>56</sup> Property plays a critical role in the delivery of municipal services. It not only provides a supportive role for service delivery but can also be a catalyst for improvement of social value within a local community.<sup>57</sup>

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<sup>53</sup> Constitution, 1996.

<sup>54</sup> Kaganova O & Nayyar-Stone R "Municipal Real Property Asset Management: An Overview of World Experience, Trends and Financial Implications" (2000) 6 *The Journal of Real Estate Portfolio Management* 307.

<sup>55</sup> Hentschel J & Utter M *U.S. Cities - An Entrepreneurial Approach to Municipal Real Estate Asset Management* 8 (2006).

<sup>56</sup> McGaffin R, Kirova M, Viruly F & Michell K *Urban Real Estate Research Unit: A Way to Overcome Urban Management Challenges and Unlock Development Opportunities* (2016).

<sup>57</sup> Phelps A "Municipal Property Asset Management - a Comparative Study of UK and Russia" (2011) 15 *International Journal of Strategic Property Management* 416.

Local governments own a vast number of properties and maintaining accurate records of those assets can be challenging.<sup>58</sup> In general, limited information is available in relation to the management of those assets. This is attributed to governments being hesitant to disclose what is considered sensitive information (or disclosing the lack of records).<sup>59</sup> Insufficient budgets and resources are also contributing factors to the lack of accurate data pertaining to operational and management costs associated with those assets.<sup>60</sup> There is an opportunity for local government to improve the management and utilisation of its property assets to increase social value delivery within its community.

Traditionally, local governments have played the role of custodian of municipal property. There have been some positive developments on this front as some local governments have started to take an active asset management approach aimed at more efficient use of the assets and enhanced delivery of local government's strategic objectives.<sup>61</sup> Some challenges do however still remain. For instance, local government departments often operate in silos, leading to division and repetition of work.<sup>62</sup> This is not conducive to social value delivery, as it requires a holistic approach. Local governments tend to be more focused on providing a stable environment and not falling foul of the bureaucratic process rather than applying innovative decision making.<sup>63</sup> In addition, openness around decisions taken and accurate recording thereof is often absent.<sup>64</sup> Without the records, this can lead to questions about whether community requirements and interests have been adequately considered.

Other challenges identified within the local government property environment include insufficient delegations in place to undertake transactions and significant responsibility being placed on property officials, often without the necessary resources to deliver on those responsibilities.<sup>65</sup> In addition, fragmented views within the different government

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<sup>58</sup> Kaganova O & Telgarsky J "Management of Capital Assets by Local Governments: an Assessment and Benchmarking Survey" (2018) 22 143.

<sup>59</sup> Kaganova & Telgarsky (2018) *International Journal of Strategic Property Management* 143.

<sup>60</sup> Kaganova (2010) *Real Estate Issues* 31.

<sup>61</sup> Hentschel & Utter *Managing Government Property Assets* 8 1.

<sup>62</sup> Kaganova & Telgarsky (2018) *International Journal of Strategic Property Management* 146.

<sup>63</sup> Hentschel & Utter *Managing Government Property Assets* 8 1.

<sup>64</sup> Kaganova & Telgarsky (2018) *International Journal of Strategic Property Management* 146.

<sup>65</sup> Hentschel & Utter *Managing Government Property Assets* 8.

branches and local community add to the complexity of operating within the local government property sphere.<sup>66</sup>

Kaganova highlights the issue of complex property transactions that need to follow a number of steps, including procurement, which may in itself take six months to a year to finalise.<sup>67</sup> If parties attempt to speed up the process to meet tight project timeframes, such as expiration of funding, it will likely result in contractual issues later.<sup>68</sup> Property management and land administration are multifaceted and therefore involve different areas of expertise including technical, legislative, and administrative knowledge.<sup>69</sup> Having the necessary resources to deal with all these aspects of the property management process can therefore be difficult.

Kaganova distinguishes between two types of local government property being those required for the provision of services by the municipality and surplus (or sometimes referred to as "core") property.<sup>70</sup> Surplus property is property that is not required to deliver municipal functions and services.<sup>71</sup> If properties are not considered to be required for municipal service delivery at present or in the future, then municipalities may choose to dispose of those surplus properties. The disposal means that the municipality would then no longer be responsible for the maintenance burden of the property, and it also allows an opportunity to create social value through the disposal.

In contrast to private practice, in local government, the legislative system takes no consideration of market conditions when determining the most opportune time to dispose of an asset. Decisions are made to sell assets to fund other projects or to lessen debt during property slumps leading to a sub-optimal sale and rental prices.<sup>72</sup> Kaganova recommends that government regulations that go against established

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<sup>66</sup> Kaganova & Telgarsky (2018) *International Journal of Strategic Property Management* 146.

<sup>67</sup> Kaganova (2010) *Real Estate Issues* 31.

<sup>68</sup> Kaganova (2010) *Real Estate Issues* 31.

<sup>69</sup> Guarini M, Battisti F & Chiovitti A "A Methodology for the Selection of Multi-Criteria Decision Analysis Methods in Real Estate and Land Management Processes" (2018) 10 *Sustainability* 507 1; Morena M, Cia G, Migliore A & Mantella S "Tools for Public Real Estate Enhancement in Italy: From Criteria to Decisions" (2021) 13 *Sustainability* 622.

<sup>70</sup> Kaganova & Nayyar-Stone (2000) *The Journal of Real Estate Portfolio Management* 314.

<sup>71</sup> Phelps A *An Examination of the Relationship between Rationale, Practice and Outcomes in Municipal Property Asset Management: A Comparative Study of the UK and Russia* Doctor of Philosophy thesis University of Birmingham (2009) 65.

<sup>72</sup> Kaganova (2010) *Real Estate Issues* 31-41.

property management principles should be improved and modernized.<sup>73</sup> This principle is also applicable to the legislative process. Even if a decision is made, at the optimal time, to sell or lease a municipal property (in terms of market supply and demand), that may no longer be the case by the time the lengthy legislative process has been concluded and the decision is implemented, which is often a few years down the line.

Property challenges faced by municipalities are not unique to South Africa - local governments in the United States and European Union also manage significant immovable property portfolios with limited accessible data available in respect of property details.<sup>74</sup> The same applies in the United Kingdom where there has also been a continued struggle with a lack of data relating to government property, including the portfolio size and its value.<sup>75</sup> In some countries, in response to funding challenges, local governments have increased prioritisation of delivering returns from commercial property investment to provide income rather than focussing on the community's social and economic requirements.<sup>76</sup> With this background in mind, it becomes important to determine how effective municipalities are in successfully managing municipal property to deliver social value objectives.

By example, municipalities in the Netherlands own immovable property for the purpose of delivering their services (i.e., office accommodation), to provide accommodation for employees and to provide for public services such as sporting and recreating facilities.<sup>77</sup> This is no different from the position in South Africa. Municipalities are not in the business of property investment as they manage their assets to provide municipal services as set out in their policies.<sup>78</sup> The focus is therefore on community needs. Van Den Beemt-Tjeerdsma concludes that the rigid policies and rules within which municipalities in the Netherlands operate need to be adapted to become more

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<sup>73</sup> Kaganova (2010) *Real Estate Issues* 31-41; Ngwira M & Manase D *Public Sector Property Asset Management* (2016) 1.

<sup>74</sup> Kaganova (2010) *Real Estate Issues* 31-41; White A "A review of the UK public sector real estate asset management" (2011) 13(1) *Journal of Corporate Real Estate* 6.

<sup>75</sup> White (2011) *Journal of Corporate Real Estate* 6.

<sup>76</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 17.

<sup>77</sup> Van Den Beemt-Tjeerdsma A & Van Den Beemt-Tjeerdsma V "Towards a more professionalised municipal real estate management" (2016) 18(2) *Journal of Corporate Real Estate* 132.

<sup>78</sup> Van Den Beemt-Tjeerdsma & Van Den Beemt-Tjeerdsma (2016) *Journal of Corporate Real Estate* 139.

resilient to better achieve municipal objectives.<sup>79</sup> The same principle applies to South Africa.

A report by the United Kingdom Audit Commission in 2000 identified several obstacles within the local government property environment, one of which is the legal constraints placed on public sector asset managers. Recommendations include being more innovative when it comes to service delivery and adapting services to be more customer orientated.<sup>80</sup> In 2010, The Efficiency Report, considered the UK government's asset management practices. The report highlighted that inefficient procurement procedures and lack of proper asset management led to significant increases in expenditure and delays.<sup>81</sup> Both reports highlight the need to adapt inefficient services to allow for better delivery of public sector objectives.

A Canadian study focusing on corporate property in the public sector found that providers of public sector property services were adapting and expanding beyond simply being providers of operational services.<sup>82</sup> Interestingly, the study identified a number of priorities, as identified by customers, such as achieving strategic government objectives, flexibility, and ease of undertaking transactions as the main priorities. This illustrates public support for a move away from simply providing a government service in isolation and instead focusing on a holistic delivery of government objectives.

Sweden's property management approach is quite unique. Local authorities have much more leeway to choose the way in which they manage their property holdings, with approximately half of the larger municipalities managing their units within a profit centre.<sup>83</sup> This contrasts with the global trend of strict regulation implemented by the majority of other municipalities. It does, however, allow the municipalities to better compete with the private sector as the rigid legislative procedures present in the majority of other local governments, have been removed.

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<sup>79</sup> Van Den Beemt-Tjeerdsma & Van Den Beemt-Tjeerdsma (2016) *Journal of Corporate Real Estate* 140.

<sup>80</sup> Ngwira & Manase *Public Sector Property Asset Management* 1.

<sup>81</sup> Green P *The Efficiency Report, United Kingdom* (2010).

<sup>82</sup> Wilson C, Leckman J, Cappucino K & Pullen W "Towards Customer Delight: Added Value in Public Sector Corporate Real Estate" (2001) 3(3) *Journal of Corporate Real Estate* 215.

<sup>83</sup> Lind H & Lindqvist T "Real Estate Management in the Swedish Public Sector" (2005) 7(2) 178.

The regulations and procedures that are required to be undertaken for municipal transactions, including property transactions, have in some cases been found to hinder strategic and optimal asset management. As an example, in the United States, extensive regulations together with insufficient funding have led to limited types of lease transactions being undertaken by local government, due to budget and time constraints, which is not beneficial for the local authority.<sup>84</sup> This results in the community losing out on services.

The above discussion illustrates that there are a number of challenges facing municipalities, both within the South African context and internationally. As a result, municipalities are not able to maximise social value delivery through their immovable property transactions. The rigid legal processes are extensive and complex and may require some reconsideration in order to enhance social benefits to the local community.

### 2.3 Defining Social Value

In recent years, the importance of social value delivery has gained increased recognition through legislation, procurement processes and public demand.<sup>85</sup> Traditionally, social value delivery has been associated with the public sector, but public perception has shifted to acknowledge that all groups have a role to play.<sup>86</sup> This has led to an increased public demand that all sectors incorporate social responsibility within their practices.<sup>87</sup> Historically, social value delivery was also considered to be limited to the domain of certain service delivery segments (e.g. health care and education) but there has been increased recognition that all areas have a role to play, including the property sector.<sup>88</sup>

There is no single accepted global definition of social value. Emerson et al. defines social value creation as the combination of resources, inputs, processes or policies to advance the standard of living for individuals or society as a whole.<sup>89</sup> Social Value

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<sup>84</sup> Kaganova (2010) *Real Estate Issues* 31-41.

<sup>85</sup> Raiden A, Loosemore M, King A & Gorse C *Social Value in Construction* (2019) 3.

<sup>86</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 8.

<sup>87</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 9; Social Value International *Understanding and Use of the Principles of Social Value* (2016).

<sup>88</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 10.

<sup>89</sup> Emerson (2003) *California Management Review* 36.

International, an international network dedicated to social impact and social value, describes social value as the value created through changes to the lives of people, organisations and entities.<sup>90</sup> The Urban Land Institute defines social value as “*the contribution of activities towards economic, social and environmental well-being*”.<sup>91</sup> The latter definition aligns with the United Nation’s Social Development Goals, discussed below.<sup>92</sup> The lack of a single accepted definition of social value may be beneficial in that it provides more flexibility during interpretation and allows for the term to be developed and adapted.<sup>93</sup> On the other hand, by failing to have a clear definition, it may lead to challenges in ensuring a fair and consistent application of the term.

During 2015, the leaders from all United Nations member states adopted 17 Social Development Goals (SDGs) aimed at addressing certain major global challenges, including poverty and inequality.<sup>94</sup> These SDGs are implemented globally through legislation, regulation, and certification through several role-players, including governments, individuals, and companies.<sup>95</sup> The adoption of these SDGs has reintroduced the importance of social value creation and how all sectors have a role to play in achieving it,<sup>96</sup> including the property sector. A number of the SDGs are applicable to the property sector. SDG 11 (Sustainable Cities and Communities) provides for the creation of cities that are “*inclusive, safe, resilient and sustainable*”.<sup>97</sup> Property has a central role to play in the delivery of this mandate.<sup>98</sup> Other SDGs that intersect with the property sector are the removal of poverty and hunger (SDG1 and 2), good health and well-being (SDG3), improved education (SDG4), reducing inequalities (SDG10), clean energy (SDG7), responsible consumption and production

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<sup>90</sup> Social Value International *Understanding and Use of the Principles of Social Value*.

<sup>91</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 13.

<sup>92</sup> Transforming Our World: *The 2030 Agenda for Sustainable Development* (2015); Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 13.

<sup>93</sup> Raiden et al *Social Value in Construction* 6.

<sup>94</sup> United Nations *Transforming our world : the 2030 Agenda for Sustainable Development*. United Nations (2015).

<sup>95</sup> Ionascu E, Anghel I & Huian M "The Involvement of Real Estate Companies in Sustainable Development - An Analysis from the SDGs Reporting Perspective" (2020) 12 *Sustainability* 798; De Paola P, Tajani F & Locurcio M "Sustainable Real Estate: Management, Assessment and Innovations" (2021) 13 1.

<sup>96</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 16.

<sup>97</sup> Transforming Our World: *The 2030 Agenda for Sustainable Development* (2015).

<sup>98</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 16.

(SDG12), and climate action (SDG13). The number of SDGs that are applicable to the property sector illustrates its key function in social value delivery.

Given the wide application of social value creation, a holistic view is required to allow for delivery to the community by all sectors, through individuals and groups (such as not-for-profit organisations), who may have different objectives and deliverables, all of which need to be combined and balanced to deliver community needs.<sup>99</sup> To improve property's function in the creation of social value, all role players must incorporate social value considerations into their decision-making models.<sup>100</sup> In the case of South Africa, the Constitution requires municipalities to incorporate social value considerations within its service delivery.

Social procurement is another aspect of social value delivery.<sup>101</sup> Direct social procurement allows for purchasing of goods and services from socially responsible businesses and businesses that provide community services such as not-for-profit organisations.<sup>102</sup> Through indirect social procurement, social value provisions are implemented through policies and contracts requiring business partners to implement certain social provisions.<sup>103</sup> Municipalities implement both direct and indirect social procurement practices.

The understanding and application of social value as a concept depend on factors such as location and type of property transaction to be delivered.<sup>104</sup> The practical application of social value delivery is also dependent on the identity of the role player. For municipalities, which are the focus of this study, social value is connected to planning and local development targets such as social housing delivery and job

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<sup>99</sup> Raiden et al *Social Value in Construction* 14; Denny-Smith G, Sunindijo RY, Loosemore M, Williams M & Piggott L "How Construction Employment Can Create Social Value and Assist Recovery from COVID-19" (2021) 13 *Sustainability* 988.

<sup>100</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 9.

<sup>101</sup> Loosemore M "Social procurement in UK construction projects" (2016) 34 *International Journal of Project Management* 133; Loosemore M, Keast R, Barraket J & Denny-Smith G "Champions of Social Procurement in the Australian Construction Industry: Evolving Roles and Motivations" (2021) 11 *Buildings* 641.

<sup>102</sup> Raiden et al *Social Value in Construction* 4; Loosemore (2016) *International Journal of Project Management* 134.

<sup>103</sup> Raiden et al *Social Value in Construction* 4; Loosemore (2016) *International Journal of Project Management* 134.

<sup>104</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 13; De Paola et al (2021) *Sustainability*.

creation.<sup>105</sup> Other role players, such as private developers tend to view social value delivery as job creation and training opportunities.<sup>106</sup> Companies and investors traditionally viewed social value as a corporate social responsibility (CSR) deliverable, but this has expanded, and companies have been incorporating social value within environmental, social and governance (ESG) business strategies.<sup>107</sup> When considering the application of social value, it is therefore important to identify how that specific role player can contribute to the creation of social value.

The true value of property is not only assessed based on financial value but also what social returns are being generated.<sup>108</sup> Local government is well placed to deliver social value to the community through its application of local context.

## 2.4 Municipalities' Mandate and Objectives in the Context of Social Value

Prior to the implementation of the Interim Constitution,<sup>109</sup> municipal functions were delivered through delegated powers which were considered to be subordinate to parliamentary legislation.<sup>110</sup> This was due to municipal legislative powers being subject to judicial review while parliamentary powers were not.<sup>111</sup> Municipalities were therefore considered to be a lower tier of government.<sup>112</sup> The Interim Constitution and Final Constitution brought about significant changes to local government's pre-constitutional powers.<sup>113</sup> In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,<sup>114</sup> the Constitutional Court confirmed that in terms

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<sup>105</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 13.

<sup>106</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 14; Ionascu et al (2020) *Sustainability* 798.

<sup>107</sup> Urban Land Institute *Zooming in on the "S" in ESG: A Road Map for Social Value in Real Estate* 13. Social Value International *Understanding and Use of the Principles of Social Value*.

<sup>108</sup> Urban Land Institute *Emerging Trends in Real Estate: Global Outlook* (2021).

<sup>109</sup> Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>110</sup> Constitution of the Republic of South Africa, Act 200 of 1993; Steytler & De Visser "Local Government" in *Constitutional Law of South Africa* 1 43; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*; *CDA Boerdery (Edms) Bpk v The Nelson Mandela Metropolitan Municipality* para 33.

<sup>111</sup> Steytler & De Visser "Local Government" in *Constitutional Law of South Africa* 1 43; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*.

<sup>112</sup> Steytler & De Visser *Local Government Law* 1-8; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*.

<sup>113</sup> Steytler & De Visser "Local Government" in *Constitutional Law of South Africa* 1 43; *CDA Boerdery (Edms) Bpk v The Nelson Mandela Metropolitan Municipality* para 37; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*.

<sup>114</sup> 1999 1 SA 374 (CC).

of the Interim Constitution, all legislative powers, including parliamentary powers, are subject to the Constitution.<sup>115</sup> It was held that municipal powers were specifically provided for in the Interim Constitution and therefore no longer considered to be subordinate delegated powers.<sup>116</sup>

In *City of Cape Town v Robertson*,<sup>117</sup> the Constitutional Court held that:

*“The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, inviolable and possesses the constitutional latitude within which to define and express its unique character subject to the constraints permissible under our Constitution”.*<sup>118</sup>

Municipal powers are set out in section 151 of the Constitution. They entitle a municipality to govern community matters “*on its own initiative*” without undue interference from other spheres of government, subject to compliance with national and provincial legislation.<sup>119</sup> Municipalities are therefore empowered to undertake their functions autonomously although provincial and national government may enact legislation in relation to these functions.<sup>120</sup>

The Constitution places several matters within the ambit of local government, which are listed in Part B of Schedules 4 and 5 of the Constitution.<sup>121</sup> Municipalities may also be allocated further powers through provincial and national legislation.<sup>122</sup> In addition, municipalities may make their own by-laws.<sup>123</sup> This shift from secondary to original powers indicates the recognition of local government’s central role in the delivery of services to communities.

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<sup>115</sup> Para 32.

<sup>116</sup> Para 34.

<sup>117</sup> *City of Cape Town v Robertson*.

<sup>118</sup> *City of Cape Town v Robertson* para 60.

<sup>119</sup> Constitution, 1996, s 151(3) & (4); *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development* 2000 1 SA 661 (CC) paras 34–59; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* para 35.

<sup>120</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* para 59.

<sup>121</sup> Para 59.

<sup>122</sup> Constitution, 1996, s 156(1)(b); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* para 60.

<sup>123</sup> Constitution, 1996, s 156(2); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* para 60.

The Constitution<sup>124</sup> defines the objectives of local government as follows:

- “(a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organizations in the matters of local government”.<sup>125</sup>

Tied to the above, it also sets out the aims of developmental duties of municipalities, including the prioritisation of the basic needs of the community and the promotion of social and economic development of the community.<sup>126</sup> The aims and objectives highlight local government’s central role in delivering social and economic betterment to the community.

The *White Paper on Local Government* also links developmental duties to the delivery of socio-economic rights.<sup>127</sup> It requires local government to work with the community to deliver social and economic value.<sup>128</sup> The *White Paper* identifies local government objectives as being central to representation of communities, safeguarding human rights and providing basic services to the community.<sup>129</sup>

In *Joseph v City of Johannesburg*,<sup>130</sup> it was held that the local government objectives contained in the Constitution<sup>131</sup> provide for a framework of requirements that are to be delivered.<sup>132</sup> The objectives are connected to and should therefore be considered

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<sup>124</sup> Constitution, 1996, s 152(1).

<sup>125</sup> Constitution, 1996, s 152; *Minister of Water and Sanitation v Amathole District Municipality* 2021 4 SA 252 ECG.

<sup>126</sup> Constitution, 1996, s 153(a).

<sup>127</sup> Department of Constitutional Development *The White Paper of Local Government [GN 423 in GG 18739 of 13-03-1998]*.

<sup>128</sup> Department of Constitutional Development *The White Paper of Local Government [GN 423 in GG 18739 of 13-03-1998]* section B 1.1.

<sup>129</sup> White Paper Department of Constitutional Development *The White Paper of Local Government [GN 423 in GG 18739 of 13-03-1998]* section B 1.1; Steytler & De Visser *Local Government Law* 9-14(7).

<sup>130</sup> 2010 4 SA 55 (CC).

<sup>131</sup> S 152(1).

<sup>132</sup> Para 35.

together with the developmental duties of municipalities provided for in the Constitution.<sup>133</sup> Municipalities are the service providers of the local community and the legal framework delivers the detail regarding developmental duties.<sup>134</sup> In *Mkontwana v Nelson Mandela Metropolitan Municipality*,<sup>135</sup> the Constitutional Court considered municipal purposes and duties. In the minority judgment, O'Regan highlighted the importance of local government's duty to provide services to the local community in a sustainable manner, in accordance with the Constitution.<sup>136</sup>

The Constitution should be interpreted with a view to retain local autonomy to allow for the delivery of community democracy and development and with due consideration to the developmental duties provided for in the Constitution.<sup>137</sup> To best utilise local resources and deliver equitable services to the local community, a municipality requires sufficient independence.<sup>138</sup> If its powers are too restricted, local government will be unable to implement new ideas to improve service delivery and development.<sup>139</sup> Without sufficient autonomy, it may not be able to establish the necessary relationships with the local community to deliver the development objectives provided for in the Constitution.<sup>140</sup>

The objectives of municipalities are amplified in the Municipal Structures Act,<sup>141</sup> which requires municipalities to annually review the community's needs, how these needs may best be served and to monitor and manage the performance thereof. Together with the Municipal Systems Act,<sup>142</sup> which specifies that municipalities must deliver on the socio-economic obligations of the Bill of Rights, it demonstrates the crucial role played by municipalities in realising a community's social and economic needs. Municipalities are required to increase local community involvement in local development and to use municipal resources to the best advantage of the local

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<sup>133</sup> Para 36.

<sup>134</sup> Steytler & De Visser *Local Government Law* 9-6.

<sup>135</sup> 2005 1 SA 530 (CC).

<sup>136</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 105.

<sup>137</sup> Steytler & De Visser *Local Government Law* 1-31; Van Wyk J "Local Government" in Faris J (ed) *LAWSA* 27 3 ed (2022) para 9.

<sup>138</sup> Steytler & De Visser *Local Government Law* 1-31; Van Wyk "Local Government" in *LAWSA* 27 para 9.

<sup>139</sup> Steytler & De Visser *Local Government Law* 1-31.

<sup>140</sup> Steytler & De Visser *Local Government Law* 1-31.

<sup>141</sup> Local Government: Municipal Structures Act 117 of 1998, s 19(2).

<sup>142</sup> See long title of the Local Government: Municipal Systems Act.

community.<sup>143</sup> Municipalities are also responsible for delivery of the fundamental rights, as provided for in the Constitution, in relation to environment, property, housing, health care, food, water, social security and education.<sup>144</sup> The main objective of these rights is to improve the social and economic interests of the local community, in particular the previously disadvantaged members of the community.<sup>145</sup>

In addition to the specific functions of municipalities, the Constitution<sup>146</sup> provides for powers incidental to the delivery of municipal functions. Where certain socio-economic rights do not fall within a particular functional area of local government, fulfilment of that right may still require the assistance of local government.<sup>147</sup> Examples include delivery of work skills training programmes provided by non-governmental organisations (“NGOs”), broadband outreach programmes and soup kitchens.<sup>148</sup>

Turning specifically to property, in *Minister of Public Works v Kyalami Ridge Environmental*,<sup>149</sup> the Constitutional Court addressed<sup>149</sup> the position of government as landowner. The court held that where government owns property, it has the same rights that a private property owner would have.<sup>150</sup> It is therefore entitled to assert this right to give effect to its constitutional obligations.<sup>151</sup> The court considered the position of government land in Canada where “unless there are legislative or constitutional restrictions applicable to a piece of property, it may be sold, mortgaged, leased, licensed or managed at the pleasure of the responsible government, and without the necessity of legislation”.<sup>152</sup> The court viewed this power to be the same as that of all

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<sup>143</sup> Local Government: Municipal Structures Act, s 4(2); Munzhedzi P & Makwembere S "Good Governance as a Solution to Local Economic Development Challenges in South African Municipalities" (2019) 54 *Journal of Public Administration* 659 661.

<sup>144</sup> Constitution, 1996, ss 24, 25, 26, 27 & 29; Steytler & De Visser *Local Government Law* 9-14(8).

<sup>145</sup> Steytler & De Visser *Local Government Law* 9-14(21); Liebenberg S "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty" (2002) 6(2) *Law, Democracy and Development* 159.

<sup>146</sup> S 156(6).

<sup>147</sup> Steytler & De Visser *Local Government Law* 9-14(21).

<sup>148</sup> Steytler & De Visser *Local Government Law* 9-14(7).

<sup>149</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC) para 40.

<sup>150</sup> Para 41.

<sup>151</sup> Para 41; *Bel Porto School Governing Body and Others v Premier Western Cape* 2002 (3) SA 265 CC.

<sup>152</sup> Para 41.

other landowners and therefore a standard right rather than a special power.<sup>153</sup> It was held that where government functions are contained in legislation, it infers that the functions can only be undertaken in accordance with the legislation. As a result, the government's powers as landowner would be trumped by the legislation.<sup>154</sup>

In principle, municipalities therefore have extensive powers to manage their property in order to deliver on constitutional objectives but the powers to manage the assets are not unfettered and are subject to national legislation, which is discussed in the next section.

## 2.5 Applicable Legislation

This section considers the legislation applicable to the sale and lease of municipal property in South Africa. A municipality's exclusive functions, as provided for in the Constitution, are subject to provincial and national legislation.<sup>155</sup> There is wide-ranging legislation governing the sale and lease process involving municipal property transactions with third parties.<sup>156</sup> The legislation provides an extensive and prescriptive structure for the sale and lease of municipal immovable property.<sup>157</sup>

This section provides an analysis of relevant legislation to illustrate the numerous and complex steps that municipalities must complete before they sell or lease municipal property to third parties. The main focus of the discussion is on the Municipal Asset Transfer Regulations. As will be discussed below, these regulations provide the most detailed steps and extensive requirements to be undertaken prior to selling or leasing municipal property. Finally, other applicable legislation, including procurement legislation, is also highlighted.

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<sup>153</sup> Para 41.

<sup>154</sup> Para 42.

<sup>155</sup> Constitution, 1996, s 151(3); *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* 2011 3 SA 434 (WCC).

<sup>156</sup> For example, the Local Government: Municipal Finance Management Act; Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008]; Local Government: Municipal Systems Act; Preferential Procurement Framework Act; Preferential Procurement Regulations [GN R 2721 in GG 47452 of 04-11-2022].

<sup>157</sup> Steytler & De Visser *Local Government Law* 11A-6; Van Wyk "Local Government" in *LAWSA* 27, 483.

## 2.5.1 Municipal Finance Management Act and the Asset Transfer Regulations

The primary legislation that governs municipal financial management is the Municipal Finance Management Act.<sup>158</sup> The Act<sup>159</sup> provides the framework for steps that must be followed prior to the disposal of a capital asset. The respective definitions of disposal and capital assets are important for this discussion. Disposal refers to loss of ownership and a capital asset includes all immovable property (such as land, property, and buildings).<sup>160</sup> The following sub-sections have been divided to provide an overview of the process, identify distinctions between the sale and lease processes and is followed by an in-depth consideration of the transaction approval process.

### 2.5.1.1 Overview

The objective of the Act is the provision of transparency of and responsibility for municipal processes.<sup>161</sup> Its focus is therefore on ensuring that the financial procedures followed by municipalities are open and fair.<sup>162</sup> The alienation of municipal immovable property is included within these financial procedures.<sup>163</sup>

One of the main provisions is that assets, which are required for the provision of basic municipal services, may not be alienated.<sup>164</sup> Another requirement is the consideration of the “fair market value” and “economic and community value received in exchange for the asset” in determining whether to alienate the asset.<sup>165</sup> In addition, transactions involving property (which is referred to as “immovable property” in the legislation) must be “fair, equitable, transparent, competitive and consistent with the supply chain

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<sup>158</sup> Local Government: Municipal Finance Management Act; Van Wyk "Local Government" in *LAWSA* 27 para 9.

<sup>159</sup> S 14.

<sup>160</sup> Local Government: Municipal Finance Management Act, s 1.

<sup>161</sup> Local Government: Municipal Finance Management Act, s 2; *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* at para 103.

<sup>162</sup> Van Wyk *J Planning Law* 3 ed (2020) 128.

<sup>163</sup> Local Government: Municipal Finance Management Act, s 14; Van Wyk "Local Government" in *LAWSA* 27 para 483.

<sup>164</sup> Local Government: Municipal Finance Management Act, s 14(1); Steytler & De Visser *Local Government Law* 11A-6; Van Wyk "Local Government" in *LAWSA* 27 para 483; *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* at para 105.

<sup>165</sup> Local Government: Municipal Finance Management Act, s 14(2); *City of Tshwane Metropolitan Municipality v Brooklyn Edge (Pty) Ltd* 2022 JDR 0432 (SCA); *Paradyskloof Golf Estate (Pty) Ltd v Municipality of Stellenbosch* 2011 2 SA 525 (SCA).

policy” of the municipality.<sup>166</sup> These provisions are extensive and provide a number of factors to be considered before transacting. Some of the criteria are quite wide and may therefore be open to different interpretations, which in turn leads to legal challenges and delays. Failure to comply with these provisions will cause a transaction to be invalid.<sup>167</sup> Non-compliance can therefore have serious repercussions for municipalities, as well as the parties transacting with them.

The overarching principles in respect of the financial dealings of municipalities, including asset management, as provided for in the Municipal Finance Management Act, are developed and expanded by the associated Municipal Asset Transfer Regulations. The regulations came into effect on 1 September 2008 and contain four governing principles.<sup>168</sup> The first relates to the identification of the value of the asset as part of the transaction process.<sup>169</sup> Secondly, it includes the principle of ensuring continuity of service delivery.<sup>170</sup> Thirdly, it provides for the transfer of risk to take place simultaneously with the asset transfer.<sup>171</sup> Lastly, it requires that assets are disposed of in a fair manner and without affecting service delivery.<sup>172</sup>

These principles are important. They ensure that municipalities clearly identify the specific asset to be disposed of and consider its value, to allow them to evaluate whether they are receiving a fair value in return. Continuity of municipal service delivery is crucial, and a municipality therefore needs to ensure that the asset is not

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<sup>166</sup> Local Government: Municipal Finance Management Act, s 14(5); *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk; Plettenberg Bay Country Club v Bitou Municipality* 2005 JDR 1212 (C).

<sup>167</sup> Sections 14(1) to 14(5) of the Act do not apply to the transfer of capital assets to other municipalities, municipal entities and organs of state, in certain prescribed circumstances, such as, where functions are transferred from one entity to another in terms of legislation, as provided for in s 14(6) of the Act and reg 20(1) of the Regulations.

<sup>168</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 3.

<sup>169</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 3(a); Van Wyk *Planning Law* 128.

<sup>170</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 3(b); Van Wyk "Local Government" in *LAWSA* 27 para 483.

<sup>171</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 3(c).

<sup>172</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 3(d); *Lephondo v Dihlabeng Local Municipality* 2015 JOL 33792 (FB); *Chiloane v Ephraim Mogale Local Municipality* 2019 JOL 41134 (GP).

needed to provide a municipal service, which will be compromised should the asset be sold or leased to a third party.

While the Municipal Finance Management Act refers to the alienation of capital assets (i.e., sales), the Municipal Asset Transfer Regulations extends the ambit to include granting of rights (which includes leases).<sup>173</sup> The regulations include detailed prescribed requirements to be complied with prior to municipalities entering into immovable property transactions.<sup>174</sup>

The Regulations are divided into three types of transactions. The first relates to transfers of non-exempted capital assets.<sup>175</sup> The second category is exempted transfers,<sup>176</sup> i.e., sales to other organs of state, in certain prescribed circumstances. The third transaction category focuses on the granting of rights to use, manage, or control capital assets,<sup>177</sup> i.e., transactions other than sales - such as lease agreements. It is important to identify the type of transaction from the outset as the regulations set out different processes to be followed, depending on the transaction category. The regulations apply to all transactions in respect of the transfer and granting of rights over municipal capital assets, subject to a limited number of specified exclusions and exemptions.<sup>178</sup>

The Municipal Finance Management Act<sup>179</sup> provides for the publication of guidelines by the responsible minister covering numerous provisions including the “alienation,

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<sup>173</sup> Local Government: Municipal Finance Management Act, s 14; Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 2; Van Wyk "Local Government" in *LAWSA* 27 para 483.

<sup>174</sup> Steytler & De Visser *Local Government Law* 11A-7.

<sup>175</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], ch 2.

<sup>176</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], ch 3.

<sup>177</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], ch 4.

<sup>178</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 2(1). The regulations also apply to certain movable assets, however, this falls outside the scope of this study. The provision of housing for the underprivileged and public-private partnership agreements are specifically excluded from the application of chapter 2 of the regulations. Public-private partnerships are regulated separately in terms of section 120 of the Municipal Finance Management Act and the Municipal Public-Private Partnership Regulations. The granting of rights to use, manage and/or control capital assets for a period of one calendar month or less, are also excluded from the application of the regulations. The Regulations apply to municipalities and municipal entities.

<sup>179</sup> S 168.

letting or disposal of assets by municipalities".<sup>180</sup> National Treasury published the Guide to the Municipal Asset Transfer Regulations during July 2012 for the purpose of supporting municipalities with the implementation of the regulations.<sup>181</sup> The guideline is a lengthy document, at just over 100 pages, and provides additional information in relation to the definition of capital, high value and significant assets as well as exempt and non-exempt assets. It includes several examples and case studies to illustrate how the legislation should be applied.

To provide an example, one of the case studies included in the guideline, which relates to a proposal to provide a soup kitchen in Valleydale, is considered.<sup>182</sup> The Guide explains that the municipality was approached by a community based non-governmental organisation intending to rent a portion of an old municipal office to provide a soup kitchen to the community, for a period of six years.<sup>183</sup> The organisation indicated that it could only pay a nominal rental amount due to financial constraints. The guideline advises that no procedural distinction is made between different types of leases (such as commercial and social leases) and as a result, compliance with all of the regulations<sup>184</sup> is still required (as would be the case in relation to a third-party commercial lease for example for business offices). It is difficult to reconcile such an outcome with the overall objective of municipal objectives, as provided for in the Constitution.

The Municipal Finance Management Act also prescribes supply chain management requirements to be followed for the disposal of goods, which includes capital assets.<sup>185</sup> The Act confirms that the sale and lease of property must comply with procurement processes, and this is why a competitive bidding process is required, such as tender or auction. All municipalities are required to implement a supply chain management policy,<sup>186</sup> which must comply with a specified framework.<sup>187</sup> It also reiterates that the

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<sup>180</sup> Local Government: Municipal Finance Management Act, s 168(1)(g).

<sup>181</sup> Guide to the Municipal Asset Transfer Regulations 2012 8.

<sup>182</sup> Guide to the Municipal Asset Transfer Regulations 2012 85.

<sup>183</sup> 85.

<sup>184</sup> Chapter 4.

<sup>185</sup> Local Government: Municipal Finance Management Act, part 1 of ch 11.

<sup>186</sup> S111.

<sup>187</sup> Local Government: Municipal Finance Management Act, s 112; *Aurecon South Africa (Pty) Ltd v City of Cape Town* 2016 1 All SA 313 (SCA); *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality* 2016 1 All SA 721 (ELC).

policy should be “fair, equitable, transparent, competitive and cost effective”.<sup>188</sup> Further details are found in the regulations relating specifically to supply chain matters.<sup>189</sup> These regulations<sup>190</sup> relate solely to procurement matters and are therefore not discussed in this section. Rather, it is grouped together with the other procurement legislation discussed in section 2.5.2.2 below.

The overall processes to be followed when undertaking sale and lease transactions are fairly similar and are therefore discussed together in section 2.5.1.4 below. Before addressing the process, a brief overview of the main distinctions between sale and lease transactions are provided in sections 2.5.1.2 and 2.5.1.3 below.

### *2.5.1.2 Sale Transactions*

The regulations distinguish between the sale of high value capital assets and other capital assets.<sup>191</sup> Additional requirements are applicable in the case of high value assets for example approvals may only be granted by the municipal council and may not be delegated.<sup>192</sup>

All other capital assets, i.e., predominantly those assets with a value of less than R50 million, are therefore grouped together in a single approval category leaving the span of other capital assets to be very wide-ranging. To name a few examples (and to illustrate the extent of the scale of the spectrum), it could include anything from prime undeveloped centrally located land with a value of R49 million, a commercial building valued at R20 million, or a community centre valued at R3 million. It could also include a small piece of road reserve adjoining a property, valued at a few thousand rands, which that adjoining owner wishes to acquire for landscaping, access, or security purposes.<sup>193</sup> These examples have been provided to illustrate that, despite the assets

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<sup>188</sup> Local Government: Municipal Finance Management Act, s 112(1).

<sup>189</sup> Municipal Supply Chain Management Regulations [GN R 868 in GG 27636 of 01-07-2005].

<sup>190</sup> Municipal Supply Chain Management Regulations [GN R 868 in GG 27636 of 01-07-2005].

<sup>191</sup> High value assets are assets valued at more than R50 million, one percent of a municipality's total capital asset value or where the total value of capital assets transferred in one year exceed 5% of the total asset value of the municipality.

<sup>192</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 5(2).

<sup>193</sup> The last example would be considered “non-viable” as the portion of road reserve could not be developed independently and would only provide value to the adjoining landowner.

being very different in terms of value and purpose, and what value they will deliver to the community, the process to be followed for approval thereof is the same.

### *2.5.1.3 Lease Transactions*

The regulations also govern the granting of rights to use, control or manage immovable property in excess of one month.<sup>194</sup> This would include leases of municipal immovable property.

The Regulations distinguish between the granting of significant and non-significant rights.<sup>195</sup> Significant rights are those rights granted in circumstances where an asset has a value in excess of R10 million and the right to be granted extends beyond a period of three years.<sup>196</sup> As with sale transactions, there are only two categories of transactions – those that are considered to be significant rights and those that are not. Whether a transaction relates to a 10-year lease of a commercial building valued at R9 million<sup>197</sup> or a two-month lease of a room in a building for provision of social services, such as a soup kitchen, the same process must be followed prior to approval.

In the next section, the approval process is considered in detail. As the processes for transfer and granting of rights share similarities, they are discussed together.<sup>198</sup> Where there are differences between the two processes, they will be highlighted.

### *2.5.1.4 Approval Process*

For ease of reference, this discussion jointly refers to high-value sale transactions and significant lease rights as “major transactions”. In contrast, those transactions that do not meet the specified thresholds are referred to as “minor transactions”. The asset

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<sup>194</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], chapter 4. Since there are some additional provisions applicable to transfer transactions, the regulations highlight that any granting of rights which exceeds the economic lifespan of an asset, should be treated as a transfer rather than a granting of rights and therefore the provisions of chapter 2 (transfer of assets) should be followed as opposed to the granting of rights provisions set out in chapter 4.

<sup>195</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 34(2).

<sup>196</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 34(2).

<sup>197</sup> As long as a transaction does not meet both requirements, i.e., the value is lower than R10m or the lease period does not exceed three years, it will not be considered a significant right.

<sup>198</sup> As exempt transfers relate to transactions with other organs of state and not the private sector, which is the focus of this study, it will not be covered here.

values attributed to major transactions were published in 2008,<sup>199</sup> some fifteen years ago. Property values have increased significantly since then. Therefore, several transactions that would have qualified as minor transactions a few years ago now fall under the category of major transactions simply due to market value appreciation.

The provisions of the Municipal Asset Transfer Regulations stipulate that six steps are to be followed, before an asset may be sold or leased to a third party. The steps are as follows: seeking authority to advertise,<sup>200</sup> undertaking a public participation process,<sup>201</sup> obtaining in principle approval,<sup>202</sup> undertaking a competitive process,<sup>203</sup> obtaining final approval to enter into a transaction<sup>204</sup> and conclusion of a contract.<sup>205</sup> The following summative table illustrates the steps involved. The steps are discussed in more detail below.

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<sup>199</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 1.

<sup>200</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 5(3).

<sup>201</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 6.

<sup>202</sup> Municipal Finance Management Act, s 14; Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 5(1)(b)(ii).

<sup>203</sup> Local Government: Municipal Finance Management Act, s 112; Van Wyk "Local Government" in *LAWSA* 27 483.

<sup>204</sup> Local Government: Municipal Finance Management Act, s 14; Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 5.

<sup>205</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 17.

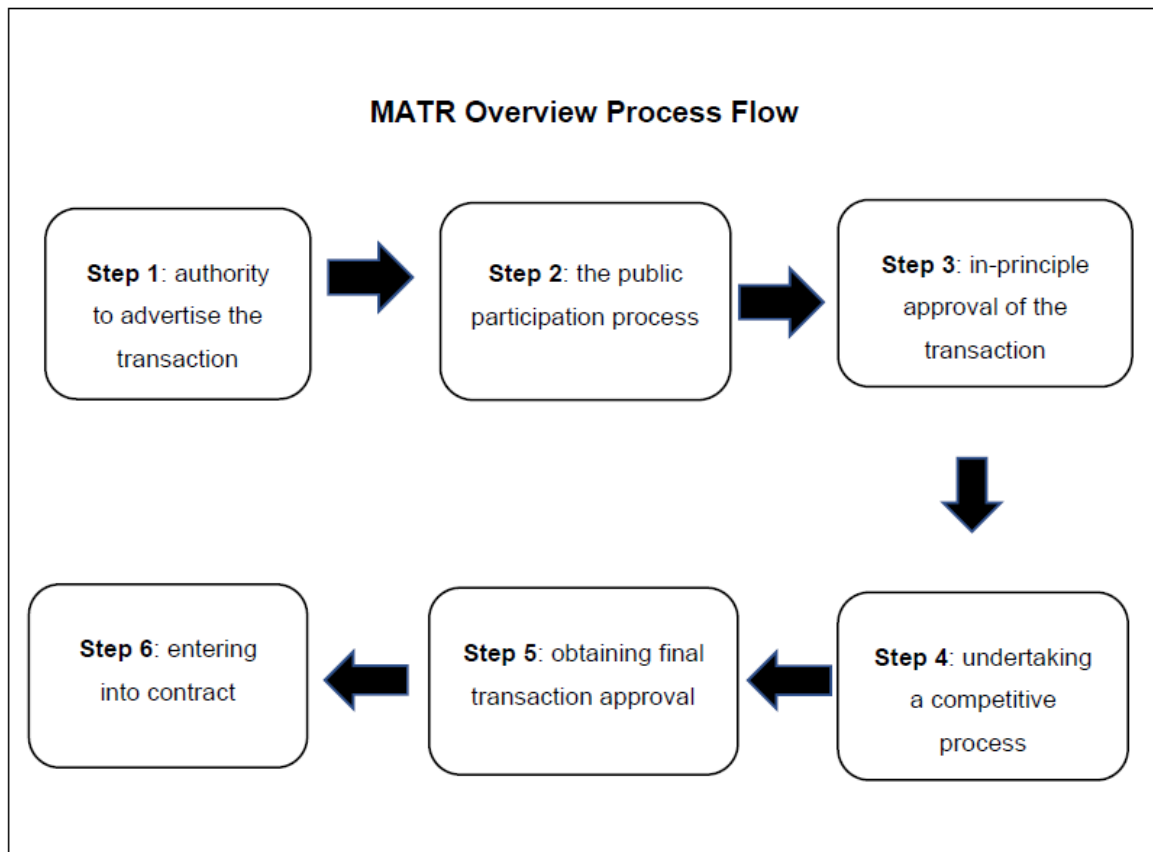


Figure 1: Overview of the six procedural steps prescribed in terms of the Municipal Asset Transfer Regulations

Starting with step 1, in the case of major transactions,<sup>206</sup> approval to undertake a public participation process may only be granted by the full municipal Council<sup>207</sup> but for minor transactions, this approval may be delegated.<sup>208</sup> Before commencing with step 2 (the public participation process), approval is required. This involves placing a preliminary proposal before the decision maker, which is then advertised for public comment.<sup>209</sup> The distinction between major and minor transactions is useful. Municipal councils do not necessarily meet every month and there are also the logistical issues of obtaining

<sup>206</sup> As discussed in sections 2.5.1.2 and 2.5.1.3 above, high value capital assets and significant rights are, in broad terms, a capital asset with a value of more than R50 million in the case of transfers and, for granting of any rights, which includes leases, assets with a value of more than R10 million and for which a rights period of more than three years is applied.

<sup>207</sup> Local Government: Municipal Finance Management Act, s14; Steytler & De Visser *Local Government Law* 11A-11.

<sup>208</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 5(2).

<sup>209</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 5(3) and 34(3).

numerous signatures on reports. Approval from legal services and cut-off dates for council's agenda mean that this initial step in itself could add a few months to the approval process. Of importance here is that municipalities implement systems of delegation to allow minor transactions to be approved by officials rather than serving before full council.

Step 2 concerns the public participation process itself. The regulations prescribe that the proposal must include an information statement with certain listed information being made available.<sup>210</sup> This includes the asset's value (and valuation method applied to determine the value), the reason for the transaction, the potential benefits thereof, expected earnings from the transaction and anticipated gains or losses.<sup>211</sup> As part of the public participation process, in the case of major transactions, the community and national and provincial treasuries must be consulted.<sup>212</sup> A minimum period of 60 days must lapse between the municipal council's public participation authorisation and the approval of the transfer.<sup>213</sup> This step therefore also adds a few additional months to the approval process. It is not suggested that public participation and comments from national and provincial treasury are not important. However, perhaps what constitutes a major transaction should be revisited. This is particularly relevant in the case of leases where the threshold for qualifying as a significant right is quite low.

Next, the municipal council must determine whether the assets are required to provide a minimum level of basic municipal services and consider the fair value to be received for the asset.<sup>214</sup> The regulations list a number of factors to be considered. Unsurprisingly, the factors for the two different types of transactions have some differences as they distinguish between temporary rights granted through a lease and the permanent alienation of a sale. For sale transactions, the considerations focus on whether fair market value has been obtained for the sale of an asset and this includes

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<sup>210</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], regs 5(3)(b) and 34(3)(b).

<sup>211</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], regs 5(3)(b) and 34(3)(b).

<sup>212</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], regs 6 and 35(b).

<sup>213</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], regs 5(3) and 35.

<sup>214</sup> Local Government: Municipal Finance Management Act, s 14(2); Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], regs 5(1)(b)(ii) and 36.

considering the wider economic value created, and the effect on the municipality's credit rating.<sup>215</sup> The regulations provide that where a municipality intends to transfer property at less than fair market value, it must take a number of interests into account. This includes the interests of the state, local community, municipality, the parties to the transaction, the collective interest and whether the community would be best aided if the asset is transferred at less than fair market value (as opposed to a sale at full market value).<sup>216</sup>

For leases, the factors to be considered include the compensation to be received together with value of any improvements, risks and benefits associated with the transaction, whether the asset is required for the municipality's own use the interests of the municipality, any affected organs of state, the impact on the community and compliance with legislative requirements.<sup>217</sup> These considerations are wide-ranging and not very specific, which can lead to challenges in the application thereof. Steytler and De Visser recommend that clearly structured factors and prioritisation of the applicable interests within the regulations would have been preferable to avoid incorrect application of the factors.<sup>218</sup>

Following the conclusion of the public participation process, council may determine "in principle" that the asset may be sold or leased.<sup>219</sup> For major transactions, this is non-delegable - the decision must be made by the municipal council.<sup>220</sup> For minor transactions, the granting of in-principle approval may be delegated<sup>221</sup> and does not require the approval of the full council. This is useful, as it allows shorter term leases and those assets with lower values to be approved within a slightly shorter timeframe.

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<sup>215</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008] regs 7 and 36; Steytler & De Visser *Local Government Law* 11A-12(2); Van Wyk "Local Government" in *LAWSA* 27 para 483.

<sup>216</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 13(2).

<sup>217</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 36.

<sup>218</sup> Steytler & De Visser *Local Government Law* 11A-14.

<sup>219</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 5(1)(b)(ii).

<sup>220</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 5(1)(b)(ii).

<sup>221</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 34(4).

However, even with this allowance, all six steps must still be followed, culminating in a lengthy approval period for all transaction types, even those considered to be minor.

Once in-principle approval has been obtained, the municipality's supply chain management policy must be followed (Step 4), which in turn must comply with the framework specified in the Regulations.<sup>222</sup> The supply chain process typically involves tenders and auctions, both of which take a considerable amount of time to complete. Steytler and De Visser argue that allowing for the application of social value considerations in exchange for municipal assets may contradict the requirements of section 14(5),<sup>223</sup> which focuses on highest price procurement principles.<sup>224</sup> They suggest that such a situation may be remedied by ensuring that a municipality's supply chain management policy explicitly provides for transactions below market value and that it includes specific factors and processes to be considered for below market transactions.<sup>225</sup>

Once a successful candidate has been identified via a competitive process, the transaction must be formalised through a written agreement and again, a list of requirements for inclusion in the agreement are provided in the regulations.<sup>226</sup> The requirements include that the agreements be concluded in writing and that a description of the asset, compensation payable and transfer of risk and accountability be clearly documented.<sup>227</sup> These requirements are important to create certainty of contract. Therefore, they are supported. However, there are a few other requirements that are less ideal. As an example, all contracts secured through a supply chain management process for a period in excess of three years, must provide for a three yearly review of the contract.<sup>228</sup> The apparent intention behind this provision is to

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<sup>222</sup> Local Government: Municipal Finance Management Act, s 112; Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008] reg 41(1).

<sup>223</sup> Local Government: Municipal Finance Management Act.

<sup>224</sup> Steytler & De Visser *Local Government Law* 12-22(9).

<sup>225</sup> Steytler & De Visser *Local Government Law* 12-22(9).

<sup>226</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], regs 17 and reg 45.

<sup>227</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], regs 17 and reg 45.

<sup>228</sup> Local Government: Municipal Finance Management Act, s116(1)(b)(iii); Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], regs 17(3)(a)(iii) & 45(3)(a)(iii).

protect a municipality's interests in the event of a transaction being delayed and market conditions changing during that time. Unfortunately, such a provision could create uncertainty for third-party purchasers and lessees in relation to project costs (i.e., leaving the sale price or rental amount open to review) and could discourage them from transacting with the municipality. This clause could be particularly problematic in the case of NGOs operating within serious budgetary constraints.

Another provision, which affects lease agreements, is that the agreement must include a clause prohibiting the lessee from ceding or sub-contracting the rights obtained.<sup>229</sup> This is again quite a restrictive provision, not often found in private-sector contracts. Third parties who may wish to sub-lease portions of the property will be dissuaded from the transaction. As an example, an NGO may wish to enter into a lease with the municipality and allow for sub-leases to offer other programmes or allow community start-up businesses an opportunity to sub-lease. Such uses would fall foul of the ceding and sub-contracting restriction.

Lastly (step 6), final approval from the municipal council is necessary, where the council must reevaluate, the considerations specified in sections 14(2)(a) and (b) of the Municipal Finance Management Act.<sup>230</sup> As part of this process, the entire agreement must be placed before the municipal council.<sup>231</sup> Once approval has been obtained, the transaction may be concluded.

It is not conducive to the process for the entire agreement to be placed before Council. To give effect to the principles of the Regulations, it is suggested that it should be sufficient for the main terms of the agreement to be considered by Council. Having to negotiate all the finer terms of the contract and place it before Council in its entirety delays the process. Furthermore, if the parties want to amend terms before signature, the contract will again need to be placed before Council. Considering that municipal councils generally meet monthly or less and that several signatures are required on reports serving before Council, just this one step may take several months to

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<sup>229</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 45(2)(a)(x).

<sup>230</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], regs 5 and reg 34(1).

<sup>231</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], regs 18 and 46.

complete. It is difficult to see what purpose this provision serves when dealing with certain types of minor transactions such as one of the examples given previously of a non-viable verge adjoining a residential property required for gardening, access, or security purposes. The effect of all agreements serving before Council will be to cause backlogs to the approval of transactions. In addition, certain types of transactions may end up serving before Council on three separate occasions (authority to undertake public participation, in principle approval and final approval). There is potential to streamline this process by combining some of the steps or delegating some of the approvals.

As the analysis above shows, the six steps are time consuming and comprehensive to the extreme. Some parts are considered to be excessive for the type of transaction being undertaken. There are also repetitive steps within the approval process. Similar to the examples provided in relation to sale transactions, the implications are that anything from a long-term lease (e.g., 20 years) of a large commercial building to a two-month lease of a small kiosk must meet the same requirements. Another example would be where a property is required for a short-term use of a few months as a soup kitchen or clinic. The approval process will end up taking much longer than the actual period of the lease and, the regulations do not allow for a shortened process where an important community need is being met. Therefore, by the time the process has been completed, it may be too late. Resources would be better utilised and social needs better met by allowing for minor transactions and transactions meeting an important community social value need to follow a less onerous process than, for example, commercial transactions.

### 2.5.2 Other Relevant Legislation

The bulk of the requirements relating to the sale and lease of municipal immovable assets are contained in the Municipal Finance Management Act and associated regulations, as discussed above. However, there are also other legislative provisions that apply to these types of transactions. These provisions impose additional requirements on municipalities and are therefore to be applied in conjunction with the Municipal Finance Management Act and regulations. The following discussion highlights the areas of overlap and potential contradictions between these different

legislative provisions. For ease of reference, the discussion of the other relevant legislation is grouped into themes, namely municipal, procurement and conveyancing legislation.

### *2.5.2.1 Municipal Legislation*

The Local Government: Municipal Systems Act 32 of 2000 applies to all municipal functions (not limited to immovable property) and its objectives are quite comprehensive. These objectives include providing for social and economic upliftment of local communities, access to affordable essential services and community participation in local government matters.<sup>232</sup>

The Act also contains numerous provisions relating to community participation requirements,<sup>233</sup> including mechanisms, processes, procedures, and methods of communication.<sup>234</sup> The public participation requirements flow from the Constitution<sup>235</sup> and the Municipal Systems Act expands on those requirements. This is of importance when dealing with the public participation requirements provided for in the Municipal Finance Management Act discussed above.

In addition, municipal planning by-laws<sup>236</sup> also need to be considered and municipalities often also have their own internal departmental policies that deal with property transactions. The planning by-laws cover a number of planning related matters that impact property transactions including alignment of development in terms of the municipal spatial development framework, property zoning and permitted uses, and sub-division requirements. Internal policies deal with how property applications should be processed and what factors should be considered.

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<sup>232</sup> See long title of the Local Government: Municipal Systems Act.

<sup>233</sup> The local community includes residents, rate payers, civil society groups and visitors.

<sup>234</sup> Local Government: Municipal Systems Act, ss 17, 18 & 21.

<sup>235</sup> Constitution, 1996, s 152(1)(e) and 160(7); *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) para 122.

<sup>236</sup> For example, the *The City of Cape Town Municipal Planning By-Law, 2015* and the *eThekweni Municipality Planning and Land Use Management By-Law, 2016*.

### 2.5.2.2 Procurement Legislation

A regulatory framework for the procurement process associated with the sale and lease of municipal land is provided in chapter 2 of the Local Government: Municipal Finance Management Act: Municipal Supply Chain Management Regulations.<sup>237</sup> It provides that a municipality's policy must set out a disposal management policy for the disposal of assets including specifying the methods through which assets may be sold.<sup>238</sup> It must also include a provision that the sale and lease of immovable property must be at a market related amount unless "public interest or the plight of the poor demands otherwise".<sup>239</sup>

Procurement processes are aimed at regulating the movement of goods and services from a provider to the municipality.<sup>240</sup> The sale and lease of municipal property to third parties are different from goods provided to a municipality. However, the Regulations do not make a distinction. Procurement is considered to be an important vehicle through which transformation and empowerment can be delivered and its objectives are not being questioned.<sup>241</sup> How appropriate its general application is to the sale and lease transactions does however need to be considered. Procurement processes tend to be more focussed on obtaining the best price for goods purchased but to what extent is the price relevant when a municipality is disposing of its property for a social rather than commercial purpose? Adapting the Regulations (or creating regulations that specifically relate to sale and lease transactions) should not be ruled out.

The Preferential Procurement Policy Framework Act 5 of 2000 and Preferential Procurement Regulations 2022 GN 2721 in GG 47452 also apply to the sale and lease of immovable property.<sup>242</sup> It provides for the application of a preference points system for the sale and lease of assets.<sup>243</sup> This becomes applicable within the competitive

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<sup>237</sup> GN R 868 in GG 27636 of 01-07-2005.

<sup>238</sup> Municipal Supply Chain Management Regulations [GN R 868 in GG 27636 of 01-07-2005], reg 40.

<sup>239</sup> Municipal Supply Chain Management Regulations [GN R 868 in GG 27636 of 01-07-2005], reg 40(2)(b)(i) and 40(2)(c)(i); Steytler & De Visser *Local Government Law* 12-24.

<sup>240</sup> Fourie D "Ethics in Municipal Supply Chain Management in South Africa" (2018) 33 *Local Economy* 726.

<sup>241</sup> Fourie (2018) *Local Economy* 734.

<sup>242</sup> Steytler & De Visser *Local Government Law* 12-23.

<sup>243</sup> Preferential Procurement Framework Act, s 2; Steytler & De Visser *Local Government Law* 12-23.

process undertaken by a municipality when awarding sale or lease transactions involving municipal property to a third party.

An 80/20 preference point system is applicable where the value is below R50 million, and a 90/10 preference point system applies to goods above R50 million. The 20 and 10 points requirements apply to specified goals. Specified goals include provision for historically disadvantaged persons and/or programmes identified in national government's Reconstruction and Development Programme.<sup>244</sup>

### *2.5.2.3 Conveyancing Legislation*

There is also further legislation that deals with the conveyancing aspect of property transactions. The Deeds Registries Act 47 of 1937 sets out the requirements for a valid contract of sale, the transfer of ownership and registration thereof in the appropriate Deeds Office.<sup>245</sup> The Land Survey Act 8 of 1997 specifies that approved diagrams or general plans are required for registration and that surveys are required for unregistered land.<sup>246</sup> The registration process can be quite cumbersome and costly and could also negatively impact social value delivery. While the appointment of a conveyancer (and the associated costs) may not be an issue when it comes to commercial transactions, small businesses that offer social services may struggle to find the necessary finance.<sup>247</sup>

The multitude of legislative requirements set out above illustrate the complicated and extensive steps to be followed by municipalities, prior to the sale or lease of municipal property. It is not difficult to imagine that the interpretation and implementation of these requirements may lead to delays and errors and subsequent legal challenges. The next section examines some of these legal challenges revealed in case law.

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<sup>244</sup> Preferential Procurement Framework Act, s 2(d).

<sup>245</sup> Section 20.

<sup>246</sup> Sections 14 and 17.

<sup>247</sup> In South-Africa, it is common practice for the purchaser to be responsible for conveyancing costs, unless the parties agree otherwise.

## 2.6 Case Law

Since the implementation of the Municipal Finance Management Act on 1 July 2004 and the associated Regulations on 1 September 2008, there have been several court cases in relation to the application of the legislation.<sup>248</sup> Two of these cases are discussed in more detail below to illustrate the pitfalls of failure to comply with (or the incorrect application of) the legislative requirements.

### 2.6.1 The *Waenhuiskrans Arniston Ratepayers Association Case*

In *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk*,<sup>249</sup> the municipality advertised its intention to subdivide, rezone and consolidate portions of municipal land for alienation for the use of business purposes.<sup>250</sup> A council resolution followed, and the municipality proceeded to call for development proposals.<sup>251</sup> Due to a lack of acceptable proposals, it was advertised three times, before finally being awarded to Arniston Bay Consortium.<sup>252</sup>

The deed of sale was concluded on 24 February 2004<sup>253</sup> and on 1 July 2004 the Municipal Finance Management Act came into effect. A further agreement (“the tripartite agreement”) was concluded between the municipality, Arniston Bay Consortium and Verreweide Eiendomsontwikkeling (Edms) Bpk (hereafter referred to as “Verreweide”) on 6 October 2004 whereby Verreweide purchased the property from Arniston Bay Consortium.<sup>254</sup> The agreement provided for certain development

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<sup>248</sup> For example, *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk*; *Plettenberg Bay Country Club v Bitou Municipality*; *Aurecon South Africa (Pty) Ltd v City of Cape Town*; *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality*.

<sup>249</sup> 2011 3 SA 434 (WCC) 103.

<sup>250</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 17.

<sup>251</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 17.

<sup>252</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 28; Van Wyk "Local Government" in *LAWSA* 27 para 483.

<sup>253</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 31.

<sup>254</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 34.

obligations and that the land would revert to the municipality in the event of the development failing to reach practical completion.<sup>255</sup>

After registration of the transfer at the Deeds Office, a new party, Mr Robert Haarburger, entered the transaction through the purchase of shares in Verreweide, and indicated to the municipality that he intended to submit new building plans.<sup>256</sup> Excavations commenced on site prior to approval of the new building plans.<sup>257</sup> The local rate payers association wrote to the municipality objecting on the basis that the plans were not approved and there was a failure to comply with section 14 of the Municipal Finance Management Act.<sup>258</sup> The association also subsequently objected on the basis that the rezoning had lapsed.<sup>259</sup>

The matter ended up before the High Court. One of the grounds raised by the ratepayer's association was that the tripartite agreement, concluded on 6 October 2004, occurred after the commencement of the Municipal Finance Management Act on 1 July 2004, and the municipality was therefore compelled to comply with the provisions thereof.<sup>260</sup> The first respondent argued that the underlying transaction, the original deed of sale, occurred before implementation of the Municipal Finance Act and therefore the Act was not applicable to the transaction.<sup>261</sup>

The court held that the tripartite agreement was a separate contract, replacing the original deed of sale between the municipality and Arniston Bay Consortium. As it was concluded after implementation of the Municipal Finance Management Act, the provisions were applicable to the transaction.<sup>262</sup>

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<sup>255</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 36; Van Wyk *Planning Law* 128.

<sup>256</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 40.

<sup>257</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 42.

<sup>258</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 43; Van Wyk *Planning Law* 128.

<sup>259</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 55.

<sup>260</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 89; Van Wyk "Local Government" in *LAWSA* 27 para 483.

<sup>261</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 90.

<sup>262</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 101.

The court considered whether there had been compliance with the provisions of the Municipal Finance Management Act. It identified three steps that had to be concluded prior to a transfer being authorised. They are as follows: a public meeting must occur where the municipal council decides that the asset is not required to deliver basic municipal services and where specific consideration is given to the fair market value and economic and community value to be obtained in exchange for the asset.<sup>263</sup>

Applying the three prerequisite steps to the actions taken by the municipality, the court found that the municipality advertised its intention to sell the land to the Arniston Bay Consortium on 25 April 2003. It should however also have advertised the sale to Verreweide, as the new buyer in terms of the tripartite agreement, which occurred almost eighteen months after the advertisement.<sup>264</sup> Affected parties were therefore unable to object to the proposed sale to a different party than the one advertised.<sup>265</sup>

The court held that the municipality failed to show that it had complied with all of the requirements of section 14(2), as it did not provide evidence of taking market value into account.<sup>266</sup> The court found that the municipality should have produced minutes of a council meeting and/or affidavits to show that it had considered market value in reaching its decision.<sup>267</sup> As a result, the decision to sell its land and the subsequent transfer thereof was set aside<sup>268</sup> and the Registrar of Deeds was authorised to cancel the deed of transfer.<sup>269</sup> This judgement serves as a warning to municipalities not to rely on previous compliance with the provisions of the legislation, where there has been a material change to the terms of the contract (in this case, a new purchaser). In such instances, the approval process must be undertaken afresh.

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<sup>263</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 105.

<sup>264</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 107.

<sup>265</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 107.

<sup>266</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 114; Van Wyk "Local Government" in *LAWSA* 27 para 483.

<sup>267</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 120.

<sup>268</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 121; Van Wyk *Planning Law* para 128.

<sup>269</sup> *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* para 128.

The case also highlights the challenges faced by municipalities in undertaking and completing the legislative processes within a reasonable time. There were several obstacles in finalising this transaction such as the lack of interest in developing the property (it had to be advertised three times), dealing with objections from the community, evaluating the proposals submitted and negotiating the development and sale terms. The court also highlighted that the delay of almost eighteen months between the property valuation and the eventual sale which would have had an impact on the property value, as initially determined, and that a revaluation should have taken place. This case illustrates that when a municipality undertakes a sale or lease transaction it needs to continuously monitor all the earlier steps in its process to ensure that information utilised, and earlier decisions reached remain current and valid.

### 2.6.2 The *CShell* Judgement

The case of *CShell 271 (Pty) Ltd v Oudtshoorn Municipality*<sup>270</sup> relates to a decision by the municipality to cancel a tender awarded to CShell for the sale and development of municipal land. CShell brought an application to review this municipal decision.<sup>271</sup> Two main arguments were submitted on behalf of the municipality. The first argument is based on the fact that the company composition was materially different from the details that were provided in the tender submission.<sup>272</sup> Secondly, the municipality argued that there was a failure to comply with the provisions of section 14(2) of the Municipal Finance Management Act.<sup>273</sup> The latter argument was based on two separate points – that the initial decision was incorrectly taken by the tender committee instead of the municipal council and that the municipality erroneously applied Ordinance 20 of 1974 instead of section 14 of the Municipal Finance Management Act during the approval process.<sup>274</sup>

On the first ground, the court found that there had been a misrepresentation of the composition and profile of the applicant, including its black empowerment percentage

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<sup>270</sup> 2012 JDR 0612 (WCC).

<sup>271</sup> *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* 2012 JDR 0612 (WCC) para 1.

<sup>272</sup> *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* para 20.

<sup>273</sup> *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* para 27.

<sup>274</sup> *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* para 27; Sharrock R "The General Principles of the Law Contract" (2012) 2012 *Annual Survey of South African Law* 402.

profile.<sup>275</sup> This was a prerequisite of the contract award, and it differed substantially from that indicated in the company's tender submission.<sup>276</sup> The court next considered whether there had been compliance with section 14(2) of the Municipal Finance Management Act when the tender was awarded.<sup>277</sup> The municipality advertised its intention to sell the immovable property, in a municipal notice dated May 2006, but did so with reference to the Municipal Ordinance 20 of 1974 and not the Municipal Finance Management Act.<sup>278</sup> The provisions of these two pieces of legislation vary significantly.<sup>279</sup> In addition, the Ordinance was repealed by the Municipal Finance Management Act as from 1 June 2004.<sup>280</sup>

The court found that the municipal manager did not have knowledge of the Municipal Finance Management Act as he would not have signed the notice referencing the repealed ordinance if he did.<sup>281</sup> Although the municipal manager claimed to be aware of the ambit and implications of the Municipal Finance Management Act, the court specifically pointed to the failure to provide an explanation in the municipal manager's affidavit as to why the error was made.<sup>282</sup> There was also evidence before the court that the official responsible for dealing with the tender, was not familiar with the requirements of the Municipal Finance Management Act.<sup>283</sup>

The court considered the judgement in *SA Metal Machinery Co (Pty) Ltd v City of Cape Town*<sup>284</sup> where Binns-Ward, J identified the objects of section 14(2) of the Municipal Finance Management Act to be twofold. Firstly, the Act aims to bar the alienation of municipal assets required to provide core municipal services.<sup>285</sup> Secondly, the Act provides a procedural framework to limit the disposal of municipal property.<sup>286</sup>

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<sup>275</sup> *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* para 68.

<sup>276</sup> *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* para 23.

<sup>277</sup> *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* para 73.

<sup>278</sup> *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* para 74.

<sup>279</sup> *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* para 75.

<sup>280</sup> Local Government: Municipal Finance Management Act, s 179; *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* para 76.

<sup>281</sup> *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* para 87.

<sup>282</sup> *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* para 87.

<sup>283</sup> *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* para 87.

<sup>284</sup> 2011 1 SA 348 (WCC).

<sup>285</sup> *SA Metal Machinery Co (Pty) Ltd v City of Cape Town* 2011 1 SA 348 (WCC) para 29.

<sup>286</sup> *SA Metal Machinery Co (Pty) Ltd v City of Cape Town* para 29.

The court applied the *Waenhuiskrans Ratepayers* judgement where it was held that section 14(2) requires a municipality to undertake three essential steps, prior to transferring immovable property. Firstly, a council meeting, which is open to the public must be held. Secondly, during the meeting, council must determine that the asset is not required for the provision of basic municipal services. Thirdly, also during the meeting, council must consider the fair market value of the immovable property and the economic and community value to be obtained through the disposal of the asset.<sup>287</sup> There was no evidence of these steps having taken place.<sup>288</sup> In addition, in order to determine fair market value, a valuation certificate should have been included in the report to council and this was not the case.<sup>289</sup> As a result of these failures, the sale was held not to be in accordance with the provisions of section 14(2).<sup>290</sup> The municipality was therefore correct in cancelling the awarded tender.<sup>291</sup> The Western Cape High Court's decision was upheld on appeal.<sup>292</sup>

Despite almost two years after the implementation of the Municipal Finance Management Act having passed, senior officials of the municipality were not aware thereof and were still applying repealed legislation. This exposes a municipality to significant risk. The case identifies a need for municipalities to implement safeguards and training to ensure that staff are familiar with current legislation and its implications.

There were several issues identified in this case, not all relating to non-compliance with the Municipal Finance Management Act. But the case offers a useful illustration that failure to comply with the provisions may result in the cancellation of an awarded tender. This creates a level of uncertainty, as third-party tenderers invest time and resources in tendering for a project. They may not be aware whether all legislative requirements were met by the municipality. The result is that the successful tenderer could enter into a contract with the municipality in good faith, only for it to be found invalid at a later stage. Third parties may therefore become hesitant to invest time

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<sup>287</sup> *SA Metal Machinery Co (Pty) Ltd v City of Cape Town* para 89.

<sup>288</sup> *SA Metal Machinery Co (Pty) Ltd v City of Cape Town* para 91.

<sup>289</sup> *SA Metal Machinery Co (Pty) Ltd v City of Cape Town* para 92.

<sup>290</sup> *SA Metal Machinery Co (Pty) Ltd v City of Cape Town* para 93.

<sup>291</sup> *SA Metal Machinery Co (Pty) Ltd v City of Cape Town* para 100.

<sup>292</sup> *CShell 271 (Pty) Ltd v Oudtshoorn Municipality* 2013 ZASCA 62.

and resources into submitting a tender for municipal property given the uncertainties involved.

## 2.7 Chapter Summary

The Constitution tasks municipalities with the creation of social value. All aspects of the municipal undertakings should therefore be considered an opportunity to deliver on this task. With the vast amounts of property within municipal ownership and/or management, it should also form part of the arsenal through which a municipality achieves its objectives.

Municipalities in South Africa wishing to sell or lease land to third parties are subject to extensive legislation. This situation is not unique to South Africa leading to many municipalities focussing more on complying with red tape than on service delivery to the community.

There is overlap between different legislative frameworks in South Africa (for example those applicable to sales and leases and those applicable to procurement). The primary legislation governing sale and lease transactions is the Municipal Asset Transfer Regulations, which is very detailed in terms of steps to be taken prior to the sale and lease of property. Even minor transactions need to comply with all the steps, resulting in a lengthy approval process. The legislation offers limited distinction between social and commercial transactions. In addition, transactions need to apply with the often-cumbersome supply chain process, which is more geared towards goods acquired by municipalities than property transactions.

As the court cases illustrate, it is easy to fall foul of the legislative provisions. The application of complex and extensive legislation creates challenges and can lead to delays and mistakes, which in turn may result in missed opportunities. The objectives of the legislation are commendable, but consideration should be given to a distinction between social and other types of transactions. A more streamlined process could be aimed at the delivery of social value through sale and lease transactions.

## Chapter 3: Research Methodology

### 3.1 Introduction

The aim of this study is to gain an in-depth understanding of the implementation of the legislative process by South African municipalities when they sell or lease immovable property to third parties. The question that follows is whether the legislative process allows for the creation of social value. This chapter sets out the research methodology applied, data collection procedures, sampling, and design of the research.

### 3.2 Approach and Design

A qualitative approach to data collection is applied, which relies on participants' judgements and ideas reflected in words rather than numbers.<sup>293</sup> A qualitative approach allows for a more tentative and explorative investigation process.<sup>294</sup> It is considered the most appropriate form of data collection for this research as the data collected reflects descriptions and opinions of participants, which is best expressed through the qualitative process. The research explores social value delivery in the context of municipal immovable property transactions. In order to best consider and understand the implications, a qualitative approach has been applied as it allows for a deeper understanding of the experiences of municipal property practitioners.

The research follows a case study design. When considering how or why something has occurred, explanatory case studies are a favoured research strategy.<sup>295</sup> Case studies are applied when considering in-depth and descriptive questions where the researcher aims to gain in-depth knowledge about how different cases provide awareness into an issue.<sup>296</sup>

Single and multiple case study designs were both considered. Single case studies are typically applied where a single critical, unique, or representative case has been identified.<sup>297</sup> This is not suitable to the current research project, as multiple

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<sup>293</sup> Yin RK *Case Study Research and Applications: Design and Methods* 6 ed (2018) 55.

<sup>294</sup> Walliman N *Research Methods: The Basics* (2011) 128.

<sup>295</sup> Yin *Case Study Research* 55.

<sup>296</sup> Creswell et al (2007) *The Counseling Psychologist* 239.

<sup>297</sup> Yin *Case Study Research* 56.

municipalities fall within the ambit of the case study, and it is considered that no single municipality can be fully representative of all of the municipalities. A multiple case study allows a researcher to investigate one challenge by utilising multiple case studies to demonstrate the challenge<sup>298</sup> and is therefore the preferred option for this study. Evidence gathered through multiple case studies is also considered more persuasive and may potentially deliver “direct replication” when reproduced,<sup>299</sup> thereby providing stronger validation of the research.

### 3.3 Data Collection

Data was collected from a number of different sources, including a review of literature and legislation, and conducting of interviews with study participants. The different data sources are discussed in more detail below and include details regarding the process undertaken to select case study participants.

#### 3.3.1 Literature Review

Case study research requires in-depth data collection. Data from a selection of documents have been collected and analysed to provide a detailed assessment for the case studies. Several sources of literature were consulted to provide a definition of social value and to identify the role of municipalities within the property environment and more particularly, in the creation of social value. An analysis of the applicable legislation was undertaken to identify municipal objectives in relation to social value and to establish the procedural requirements applicable to the sale and lease of municipal property to third parties.

Case law was also examined to identify the challenges faced by municipalities in navigating the legislative requirements surrounding the implementation of the legislation. Lastly, international literature was considered to identify how other municipalities overcome challenges associated with social value delivery.

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<sup>298</sup> Creswell et al (2007) *The Counseling Psychologist* 246.

<sup>299</sup> Yin *Case Study Research* 52.

### 3.3.2 Semi-Structured Interviews

Primary data was collected by way of semi-structured interviews, constructed to assess all of the identified aspects applicable to the legislative framework of municipal property sale and lease process.

Interviews allow for flexibility and probing questions to obtain a better understanding of the questions raised<sup>300</sup> and are therefore considered a more appropriate method of data collection than surveys, given the nature of the data required for this study. A semi-structured interview was selected as it contains both structured and unstructured parts to allow for pre-determined questions but with scope for open-format questions as well.<sup>301</sup> An interview guide was prepared, and interviews were recorded to allow for an accurate record of the entire interview process. Interviews were conducted electronically, via MS Teams. Interviews took approximately 40 minutes to complete.

The interview guide<sup>302</sup> has been divided into two sections: the first section covers the processing of transactions relating to the sale and lease of municipal immovable property to third parties. The second part is a narrower investigation into the participants' understanding and application of the legislation applicable to the transactions and more specifically, how this impacts social value delivery.

### 3.3.3 Selection of Case-Study Municipalities

South Africa has 278 municipalities, of which eight are classed as metropolitan, 44 are district municipalities and the remaining 226 are local municipalities.<sup>303</sup> It is not possible or practical to thoroughly examine all South African municipalities through a case study. Metropolitan municipalities have exclusive executive and legislative authority within their areas<sup>304</sup> and provide a full basket of municipal functions.<sup>305</sup> They serve populations in excess of one million people and are responsible for the bulk of

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<sup>300</sup> Walliman *Research Methods* 99.

<sup>301</sup> Walliman *Research Methods* 99.

<sup>302</sup> See Annexure 3 for a copy of the interview guide.

<sup>303</sup> "Local Government" (2022) <<https://www.gov.za/about-government/government-system/local-government>> (accessed 09/08/2023).

<sup>304</sup> Constitution, 1996, s155(1)(a).

<sup>305</sup> Steytler & De Visser *Local Government Law* 2-21.

municipal expenditure.<sup>306</sup> As they serve the largest populations, they are best placed to provide information relating to municipal sale and lease transactions. The focus of this research has therefore been limited to metropolitan municipalities.

The aim of the study is to identify and investigate the challenges faced by municipal officials in delivering social value through municipal property transactions when implementing the extensive legislation applicable to these types of transactions. Other issues that may impact municipal social value delivery such as poor performance due to lack of financial controls and financial mismanagement (e.g., audit irregularities) are not the focus of this study and may skew the results. The study has therefore been limited to well-functioning metropolitan municipalities with the necessary financial and human resources to implement legislation effectively.

In selecting metropolitan municipalities for the study, numerous factors were considered, including the latest Auditor General report results available at the time when municipalities were identified.<sup>307</sup> The Auditor General's findings in relation to qualified / unqualified audits, wasteful and / or irregular expenditure, as well as corruption were determining factors in the selection process. Initially, five potential metropolitan municipalities were identified, out of a total of eight, as they received unqualified audit reports, both with and without findings.<sup>308</sup>

Next, the Auditor General's findings were evaluated to determine whether those findings impacted areas falling within the scope of the study. Of the five remaining municipalities, one was excluded based on having going-concern problems for the last three years.<sup>309</sup> Another was disqualified, as several senior officials within the property department were suspended and subsequently removed from their posts following accusations of corruption.<sup>310</sup> The remaining three metropolitan municipalities were

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<sup>306</sup> Consolidated General Report on Local Government Audit Outcomes MFMA 2020-21 10.

<sup>307</sup> Consolidated General Report on Local Government Audit Outcomes MFMA 2020-21.

<sup>308</sup> Municipalities with qualified audit reports and outstanding audit reports were excluded from the study as they are not considered to be well functioning.

<sup>309</sup> Consolidated General Report on Local Government Audit Outcomes MFMA 2020-21 21.

<sup>310</sup> City of Johannesburg "Inaction on SIU Report leads to removal of Joburg Property Company Chairperson" (2022) <[https://www.joburg.org.za/media\\_/Pages/Media/Media%20Statements/2022%20Media%20Statements/JANUARY/Inaction-on-SIU-Report-leads-to-removal-of-Joburg-Property-Company-Chairperson](https://www.joburg.org.za/media_/Pages/Media/Media%20Statements/2022%20Media%20Statements/JANUARY/Inaction-on-SIU-Report-leads-to-removal-of-Joburg-Property-Company-Chairperson)> (accessed 22/07/2023).

selected to partake in the study.<sup>311</sup> They are the City of Cape Town, City of Ekurhuleni, and eThekweni Municipality. All three municipalities were approached and two of them agreed to take part in the research – City of Cape Town and eThekweni Municipality. Numerous requests and follow-up emails were sent to the third municipality, City of Ekurhuleni, but as it failed to respond positively after a lengthy period of time it was decided to proceed with the interviews of the other two municipalities.

### 3.3.4 Selection of Interview Participants

Following approval from the two metropolitan municipalities to conduct research, a senior official within the relevant department was contacted to seek guidance on the structure within the department and to discuss and agree on the best method to ensure a fair representation of the branch and random selection of candidates. To obtain a wider range of experiences and views, the aim was to find participants from as many different qualifying branches within the property departments of the two municipalities as possible.

The City of Cape Town's Property Management Department consists of a number of branches with the main division being between viable and non-viable transactions.<sup>312</sup> The City of Cape Town's Property Management Department also has specialist branches that deal with transactions involving high commercial, social and/or environmental value and development facilitation. A total of twenty one potential interview participants were identified at the City of Cape Town. eThekweni Municipality's Real Estate Department is divided in two sections, namely sale and leases. The sections are further sub-divided into branches, which distinguish between commercial and social transactions. Seventeen potential qualifying participants were identified at eThekweni Municipality.

Potential study candidates were contacted to seek their consent to be included in the study. As a result, a total of nine participants were identified and included in the study,

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<sup>311</sup> The latest Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22 was released on 31 May 2023. The City of Cape Town's audit outcome improved, from financially unqualified with findings to a clean audit. eThekweni Municipality's outcome remained the same as the previous year, at unqualified with findings.

<sup>312</sup> Non-viable transactions may not require a competitive process to be followed as the property only has value to adjoining owners and cannot be developed on its own, due to planning or physical restrictions.

consisting of five officials from the City of Cape Town and four from eThekweni Municipality. In order to ensure anonymity, participants' identities have not been included but they have been given codes for reference purposes in this research report.

At the start of the interview, screening of qualifying criteria was applied. Participants were requested to provide details regarding their current designation within the municipality, the number of years in that role as well as an overview of their qualifications and experience within the property environment. Interviewees were also requested to confirm whether they undertook transactions involving the sale or lease of municipal property to third parties and the frequency thereof. Only interviewees who undertake sale and lease transactions frequently and independently were included within this study.

### 3.3.5 Interviewees' Qualifications and Experience

The participants had a wide range of training and skill sets, including qualifications in property studies, finance, law, and public administration. Experience and areas of knowledge are also wide-ranging and include finance, housing, conveyancing, and surveying. All participants have been employed in the public sector for several years and have been operating in the property environment for over a decade.

The specific job titles and roles of each participant within the respective municipalities have not been revealed. Given the limited number of qualifying participants, this could lead to identification of the participants. City of Cape Town participants are coded CT1 to CT5 and eThekweni Municipality's participants are coded EM1 to EM4.

### 3.3.6 Population and Sample

Walliman provides characteristics of representative samples, one of them being homogeneity (i.e., where all the selected case studies are similar).<sup>313</sup> Another is where samples are grouped by type which consists of different groups.<sup>314</sup> The cases in this study display a high level of homogeneity as they are all well-functioning

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<sup>313</sup> Walliman *Research Methods* 95.

<sup>314</sup> Walliman *Research Methods* 95.

metropolitan municipalities within South Africa undertaking property transactions with third parties.

Although larger samples are more representative, a pragmatic approach should be followed to allow for realistic resourcing such as cost and time.<sup>315</sup> Metropolitan municipalities were identified as prime candidates for the study as they service larger areas and are therefore more likely to undertake the majority of sale and lease transactions. They are also responsible for both executive and legislative functions within their areas of responsibility.<sup>316</sup>

Probability sampling has been applied to ensure that interviewees from each municipality are selected at random, with each qualifying interviewee having an equal opportunity of being selected, thereby allowing for the amalgamation of components.<sup>317</sup> Given the specific criteria applicable to potential interviewees, it was important to identify qualifying officials early in the process as only a limited number of staff within each department could potentially qualify for the study. In addition, as the aim of the study is to determine implications throughout the department, it was important to ensure that different branches were included in the study, as discussed in more detail in section 3.3.4 above. Four out of seventeen potential qualifying participants from eThekweni Municipality took part in the study and five out of twenty-one from the City of Cape Town. The sample size is therefore considered representative.

As the aim of the interviews was to gather information about experiences associated with the sale and lease process, senior operational staff were considered to be the most suitable candidates. Participants were required to have practical knowledge of the overall sale and lease process, and to undertake transactions unaided. Accordingly, more junior members of staff who performed administrative assistance were excluded from the study. Direct involvement in the transaction process was also a requirement as it allowed participants to comment on their observations and experiences of the municipal sale and lease process. As a result, senior managers

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<sup>315</sup> Walliman *Research Methods* 95.

<sup>316</sup> Constitution, 1996, s155(1)(a).

<sup>317</sup> Walliman *Research Methods* 96.

who were not directly involved with undertaking the sale and lease process were also excluded from the study.

### 3.3.7 Validation

Castillo's interview protocol refinement (IPR) framework sets out four steps for developing interview protocols.<sup>318</sup> The first step is to ascertain that there are no inconsistencies between interview questions and research questions.<sup>319</sup> Secondly, one must ensure that the interview questions allow for a conversation. The last two steps provide for independent review of the protocol followed by a pilot study, where possible.<sup>320</sup> Where an interviewer is unable to obtain access to participants to conduct a pilot study, the third step (i.e., independent review of the protocol) becomes even more crucial.<sup>321</sup>

Castillo identifies a few methods to assist with step three, one of which is a close reading of the interview protocol and utilisation of an activity checklist which is checked against the interview questions to determine whether certain key elements are present.<sup>322</sup> Castillo's activity checklist has been applied to the interview questions for this study and, as a result, some of the interview questions were adapted and the order of questions reorganised.

A pilot study was considered, but the process of identifying qualifying municipalities, resulted in only three potentially qualifying municipalities being identified, all three of which were due to partake in the actual study. Given that only a limited number of officials at each municipality undertake the required transactions and partaking in the pilot study would disqualify staff to undertake the actual study, a pilot study could negatively affect reliability of the actual study. A pilot study was therefore not undertaken.

As multiple case studies were selected, the external validity is strengthened compared to a single-case study, as it allows an opportunity to compare the different cases. A

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<sup>318</sup> Castillo-Montoya M "Preparing for Interview Research: The Interview Protocol Refinement Framework." (2016) 22(5) *The Qualitative Report* 811.

<sup>319</sup> Castillo-Montoya (2016) *The Qualitative Report* 812.

<sup>320</sup> Castillo-Montoya (2016) *The Qualitative Report* 812.

<sup>321</sup> Castillo-Montoya (2016) *The Qualitative Report* 827.

<sup>322</sup> Castillo-Montoya (2016) *The Qualitative Report* 825.

test for possible bias was introduced by assessing the extent to which the researcher and the interview guide allowed for and adapted to contrary findings.<sup>323</sup> Changes were implemented to reduce possible bias. Further validation was also undertaken through triangulation of different data sources by verifying evidence from the sources against the created themes.<sup>324</sup>

### 3.4 Data Analysis

Data analysis was undertaken through data reduction, data display and deducing of findings.<sup>325</sup> Data reduction was achieved through the coding, grouping, and condensing of the gathered data.<sup>326</sup> Both inductive and deductive coding approaches were applied. NVivo software was utilised to assist with the coding and data reduction process. Data types were identified, and the data was subdivided within the types to assist with organising of the data. Pattern coding was utilised to identify patterns and common themes,<sup>327</sup> which were analysed within the smaller groupings. This allowed for the data to be divided into more manageable sections and, through the software, for common themes to be identified and explored. Chapter 4, which covers data analysis, has been structured around the main themes identified during the coding process.

In terms of the research approach, an initial theory was devised and examined through an analysis of the secondary data. Data was analysed through both inductive and deductive processes.<sup>328</sup> Chapters 4 and 5 considers the identified themes against the literature and research objectives.

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<sup>323</sup> Yin *Case Study Research* 46.

<sup>324</sup> Creswell *Research Design* 251.

<sup>325</sup> Walliman *Research Methods* 132.

<sup>326</sup> Walliman *Research Methods* 132.

<sup>327</sup> Walliman *Research Methods* 132; Creswell *Research Design* 245.

<sup>328</sup> Creswell et al (2007) *The Counseling Psychologist* 234.

### 3.4.1 Cross-Case Analysis

The study involves data from two metropolitan municipalities which allowed for cross-case analysis to be undertaken. The initial analysis allowed for identification of patterns and themes which were relied on for the cross-case analysis.<sup>329</sup>

As part of the analytical strategy, contending explanations were identified and examined.<sup>330</sup> One of the techniques recommended by Yin, is “pattern matching” by using a case base approach to analyse across two (or more) cases.<sup>331</sup> The questions posed for the representatives of both case-study municipalities were the same allowing for cross-case analysis to be possible. As both case-study municipalities are South African and subject to similar legislation, a high level of homogeneity was present allowing for extensive cross-case analysis.

### 3.4.2 Thematic analysis

The initial data was collected and organised to identify emerging themes. The data and themes were reviewed and adapted during the research gathering process until an extensive collection of themes were identified.<sup>332</sup> This allowed for the development of the theory as the understanding thereof was developed through the results of the investigation.<sup>333</sup> A deductive approach was applied by revisiting collected data to establish whether more information needed to be gathered.<sup>334</sup>

Themes were identified both within the two individual case-study municipalities as well as across them.<sup>335</sup> This was used to allow for a detailed discussion of the key themes and considered variation of perspectives between participants of the two case-study municipalities.<sup>336</sup> During the initial analysis of the interview data, NVivo Software was utilised to identify general ideas and recurring themes. This allowed for the identification of key themes that were present in multiple interview responses.

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<sup>329</sup> Walliman *Research Methods* 134.

<sup>330</sup> Yin *Case Study Research* 44.

<sup>331</sup> Yin *Case Study Research* 44.

<sup>332</sup> Creswell et al (2007) *The Counseling Psychologist* 234.

<sup>333</sup> Walliman *Research Methods* 131.

<sup>334</sup> Creswell et al (2007) *The Counseling Psychologist* 234.

<sup>335</sup> Creswell *Research Design* 249.

<sup>336</sup> Creswell *Research Design* 249.

The final analytical step considered the lessons learnt as a basis for establishing findings.<sup>337</sup>

### 3.5 Reliability

Yin advises that the aim of a reliability test should be to ensure that, if other researchers were to follow the same procedures within the same case study, they would reach the same findings.<sup>338</sup> This would demonstrate that mistakes and biases have been limited.<sup>339</sup> One way to demonstrate reliability is to catalogue the steps followed during the research process.<sup>340</sup> The steps followed during the research have been recorded and checked and the procedures have been detailed to minimise the risk of the reliability of the data being compromised.

To further ensure consistency, and thereby reliability, a case study protocol was created, based on the model provided by Yin.<sup>341</sup> The case study protocol sets out the purpose of the protocol, data collection methods, case study questions and an evaluation process.<sup>342</sup>

Yin also recommends the application of case study tactics for four design tests, which considers validity and reliability, to assess the quality of research gathered.<sup>343</sup> The tactics were applied to the case studies to test the value of the data. Given the sensitive nature of the research, the application of the design tests to the research steps allowed for the potential of bias to be minimised.

An extract of the tactics is included below.

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<sup>337</sup> Creswell *Research Design* 249.

<sup>338</sup> Yin *Case Study Research* 46.

<sup>339</sup> Yin *Case Study Research* 46.

<sup>340</sup> Yin *Case Study Research* 46.

<sup>341</sup> The protocol is an adaptation of Yin's Table of Contents for a Protocol. Yin *Case Study Research* 73.

<sup>342</sup> See Annexure 2 for a copy of the Case Study Protocol.

<sup>343</sup> Yin *Case Study Research* 64.

Tests	Case Study Tactic	Phase of research in which tactic occurs
<b>Construct validity</b>	Multiple sources of evidence	Data collection
	Establish chain of evidence	Data collection
	Have key informants review draft case study report	Composition
<b>Internal validity</b>	Pattern matching	Data analysis
	Explanation building	Data analysis
	Address rival explanations	Data analysis
	Logic models	Data analysis
<b>External validity</b>	Apply replication in multiple case studies	Research Design
<b>Reliability</b>	Case study protocol	Data collection
	Case study database	Data collection

Figure 2: Case study tactics for four design tests<sup>344</sup>

### 3.6 Limitations

This study was directed at well-performing municipalities in South Africa and findings may therefore not be generalisable to municipalities that are performing poorly as other factors, such as poor management or lack of financial controls may also impact their service delivery. The study only included metropolitan municipalities and the results may therefore be less applicable to smaller district and local municipalities.

<sup>344</sup> Yin *Case Study Research* 43.

The study focuses on the views and experiences of senior municipal officers and as they are considered to be more directly involved in and familiar with the overall lease and sale process and the legislative framework. Results may therefore be less applicable to junior members of staff.

### 3.7 Ethical Considerations

Before undertaking any data collection and analysis that involve human participants, approval of ethics in research projects was obtained from the Faculty of Engineering and the Built Environment's Ethics in Research Committee.<sup>345</sup>

All participants in the study were required to provide prior written consent in the form of an informed consent letter.<sup>346</sup> The informed consent letter explained the requirements to participants and what would be expected of them during the interview process. It identified the aim of the project and that there were no identified risks associated with the study. The informed consent letter also specified that no compensation would be payable but that the study would assist to gain a better understanding of the challenges faced by local government property management practitioners in the processing of sale and lease transactions with third parties.

All information collected during the study has been stored securely and treated as confidential. The findings do not identify any specific participant and codes have been applied in the final research report to ensure anonymity of study participants.

The Principal Investigator of this research project is an employee of the City of Cape Town, which is one of the selected case-study municipalities. All participants were made aware of this aspect and were advised that the information provided by them would be utilised for the purposes of this study only. All participants were advised that they would be entitled to withdraw from the study at any time.

All participants in the study were informed of the type of research project being undertaken and provided written consent in the form of an informed consent letter. The aim of the informed consent letter was to explain to participants what is required

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<sup>345</sup> See Annexure 1 for a copy of the Ethics Approval.

<sup>346</sup> See Annexure 4 for a sample of the Informed Consent Letter.

of them and to highlight any possible risks, the aim of the project and how the information will assist in meeting the project's objectives.<sup>347</sup>

### 3.8 Chapter Summary

The research methodology applied is aimed at gaining comprehensive knowledge of the legislative process associated with the sale and lease of municipal property to third parties. The research followed a qualitative case study design. Case study research requires detailed data collection involving the collection of primary and secondary data.

Primary data was collected through semi-structured interviews which allowed for some flexibility regarding the questions posed. Property officials from two South African metropolitan municipalities were interviewed. The main focus of the interviews was the application of the legislation to municipal immovable property transactions. Participants were therefore identified based on their practical experience of undertaking these types of transactions.

Secondary data was collected from a selection of documents including literature, legislation, and case law. The next chapter discusses data presentation and analysis.

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<sup>347</sup> Williams M *The Ethics of Social Research* (2003).

## Chapter 4: Data Presentation and Analysis

### 4.1 Introduction

This chapter presents and considers the findings from the interviews conducted with municipal officials. Qualitative data relies on interpretation and application, and it therefore requires its own measurements to ensure an objective and unbiased interpretation, which differs from the statistical analysis of quantitative data.<sup>348</sup> As part of the initial data analysis process, a number of themes were identified, and the findings have been structured around those themes. These themes can be divided into two categories. The first category of themes considers the overall challenges associated with the municipal sale and lease process. The second category of themes focuses on legislative challenges.

Section 4.2 of this chapter provides an overview of the two case-study municipalities. This is followed by a discussion and analysis of the findings in section 4.3.

### 4.2 The Case-Study Municipalities

The study relates to South Africa's metropolitan municipalities. All eight metropolitan municipalities were initially considered. After investigation, and the application of qualifying criteria, which was discussed in chapter 3,<sup>349</sup> three municipalities were identified and approached, being City of Cape Town, City of Ekurhuleni, and eThekweni Municipality. The City of Cape Town and eThekweni Municipality agreed to take part in the study at the time of finalising the data analysis. Before turning to the data gathered from the interviews, an overview of the two municipalities is provided. A map illustrating the location of the eight South African metropolitan municipalities has been included below.

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<sup>348</sup> Walliman *Research Methods* 73.

<sup>349</sup> See section 3.1 of chapter 3.



Figure 3: Map of South African Metropolitan Municipalities<sup>350</sup>

#### 4.2.1 City of Cape Town

As discussed in the previous chapter, the City of Cape Town is one of three metropolitan municipalities (out of a total of eight metropolitan municipalities in the country) that is considered to be a well-functioning municipality, for the purposes of this study. It received a clean audit finding from the Auditor General in the latest audit outcomes report and financially unqualified with findings outcomes in the preceding four years.<sup>351</sup> The City of Cape Town's municipal boundary is shown below.

<sup>350</sup> "Map of the Metropolitan Municipalities of South Africa" (2016) <[https://commons.wikimedia.org/wiki/File:Map\\_of\\_the\\_metropolitan\\_municipalities\\_of\\_South\\_Africa\\_%282016%29.svg#filehistory](https://commons.wikimedia.org/wiki/File:Map_of_the_metropolitan_municipalities_of_South_Africa_%282016%29.svg#filehistory)> (accessed 21/07/2023).

<sup>351</sup> Auditor General of South Africa Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22.



Figure 4: City of Cape Town municipal boundary<sup>352</sup>

#### 4.2.1.1 Overview

The City of Cape Town is located on the southern peninsula of the Western Cape province and consists of an area of 2 441 km<sup>2</sup>.<sup>353</sup> It is South Africa's second-largest economic hub.<sup>354</sup> Its three largest sectors are commercial (finance, insurance, property, and business services), manufacturing and hospitality (which includes wholesale and retail trade, catering, and accommodation).<sup>355</sup>

<sup>352</sup> *A Complete Guide to Municipalities of South Africa* 13 ed (2023) 198.

<sup>353</sup> *Main Municipalities of South Africa* 198.

<sup>354</sup> *Municipalities of South Africa* 198.

<sup>355</sup> *Municipalities of South Africa* 198.

The City of Cape Town has the country's second largest population, estimated at 4 678 900 in 2021.<sup>356</sup> The latest household statistics placed the number of households at 1 264 949.<sup>357</sup> During 2020, 1,5 million people in Cape Town were employed, 429 128 were unemployed but seeking work, and 29 241 were not actively seeking employment.<sup>358</sup> During the first quarter of 2023, Cape Town recorded an unemployment rate of 23,4% while the national unemployment rate was at 32,9%.<sup>359</sup>

The City's services include access to water and sanitation, waste removal, and access to energy supply. Since 2014, there has been a general increase in access to basic services with the exception of energy supply.<sup>360</sup>

#### *4.2.1.2 Strategy and Key Priorities*

The below diagram indicates the City of Cape Town's strategic plan, priorities, and foundations. One of the three foundations is that of achieving a more spatially integrated and inclusive city. This foundation is further described as providing a more equitable distribution of access to economic opportunities and social facilities and increased investment in municipal infrastructure to address apartheid spatial planning.<sup>361</sup>

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<sup>356</sup> City of Cape Town Five Year Integrated Development Plan July 2022 - June 2027 22. The population size, based on the results from the 2011 census, is 3 740 026.

<sup>357</sup> *Main Municipalities of South Africa* 196.

<sup>358</sup> City of Cape Town Five Year Integrated Development Plan 24.

<sup>359</sup> "Quarterly Labour Force Survey - Quarter 1: 2023" (16-05-2023) <<https://www.statssa.gov.za/publications/P0211/P02111stQuarter2023.pdf>> (accessed 21/07/2023) 28.

<sup>360</sup> City of Cape Town Five Year Integrated Development Plan 26. This is due to the national loadshedding programme, and not due to any shortcomings of the City.

<sup>361</sup> City of Cape Town Five Year Integrated Development Plan 17.

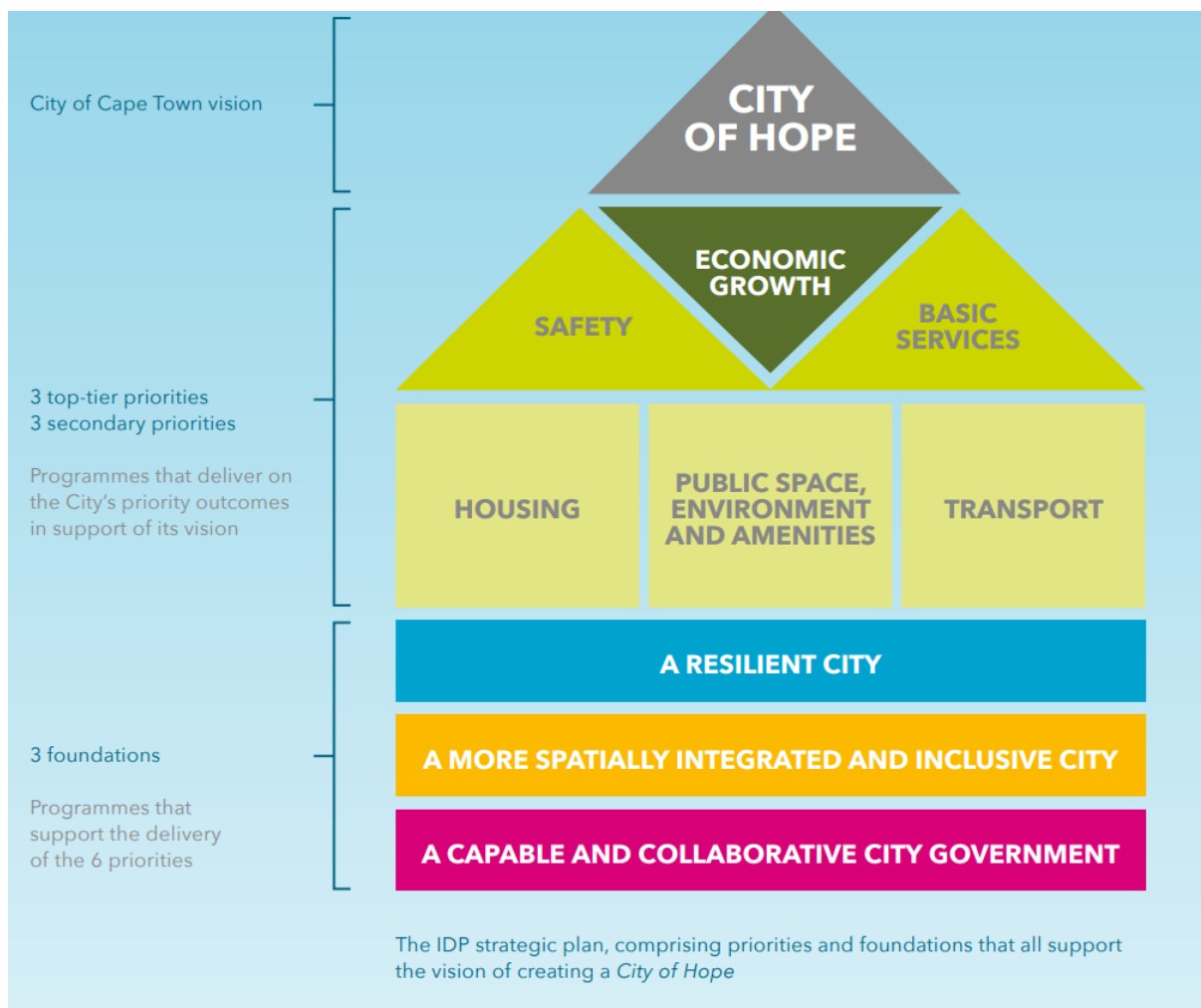


Figure 5: Diagram showing the City's focus areas over the next five years<sup>362</sup>

The City's focus areas are the creation of a “*prosperous, inclusive and healthy City*” allowing for opportunities to speed up economic growth in order to provide social upliftment.<sup>363</sup> The City aims to utilise public resources to create a “*more caring, more inclusive, more prosperous, more united, more respectful, more safe and more free*” City.

One of the main challenges identified by the municipality is that of housing provision. The housing market, which includes both private and public housing developers, has been unable to meet demand for housing, leading to increased informal housing in the city.<sup>364</sup> The City of Cape Town's Integrated Development Plan indicates that the

<sup>362</sup> City of Cape Town Five Year Integrated Development Plan 16.

<sup>363</sup> City of Cape Town Five Year Integrated Development Plan 15.

<sup>364</sup> City of Cape Town Five Year Integrated Development Plan 22.



#### 4.2.2.1 Overview

eThekweni Municipality is located within the province of KwaZulu-Natal, and includes the city of Durban, which is the country's third largest city.<sup>369</sup> It hosts Africa's busiest port.<sup>370</sup> The municipality's main economic sectors are finance (22%) and manufacturing (22%).<sup>371</sup>

eThekweni Municipality is the only metropolitan municipality located within KwaZulu-Natal. It encompasses an area of 2 556km<sup>2</sup>. eThekweni municipality has a population of 3 702 231 consisting of 1 125 767 households.<sup>372</sup> It has a population growth of 1.43% per annum.<sup>373</sup> The municipality's unemployment rate for the first quarter of 2023 is estimated at 19,4%.<sup>374</sup> That places it below the national unemployment rate of unemployment rate of 32,9% and the City of Cape Town's rate of 23,4%.

#### 4.2.2.2 Strategy and Key Priorities

The municipality's Vision Statement<sup>375</sup> provides for it to be Africa's most caring and liveably City, by 2030. An extract of its vision has been included below. The vision includes poverty reduction and moving towards a more democratic and equal city.<sup>376</sup>

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<sup>369</sup> *Municipalities of South Africa* 89.

<sup>370</sup> *Municipalities of South Africa* 89.

<sup>371</sup> *Municipalities of South Africa* 89.

<sup>372</sup> *Main Municipalities of South Africa* 89.

<sup>373</sup> *Main Municipalities of South Africa* 89.

<sup>374</sup> "Quarterly Labour Force Survey - Quarter 1: 2023" 34.

<sup>375</sup> As set out on page 411 of the municipality's Integrated Development Plan.

<sup>376</sup> City of Cape Town Five Year Integrated Development Plan.

## **Our Vision**

By 2030 eThekweni will enjoy the reputation of being Africa's most caring and liveable City, where all citizens live in harmony.

### **Our core values**

Sustainability

Economically successful city

Caring city

Smart city

Poverty reduction and Democratic & Equal City

*Figure 7: eThekweni Municipality's Vision as extracted from its Integrated Development Plan<sup>377</sup>*

The municipality's strategy includes an eight-point medium-term plan. An extract of the municipality's strategy is provided below.

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<sup>377</sup> eThekweni Municipality Five Year Integrated Development Plan 2022/23 to 2026/27: Draft 2022/2023 Review 411.



Figure 8: eThekweni Municipality's Strategy<sup>378</sup>

The fourth point of the plan concerns the creation of a socially equitable environment, which aims to achieve a safe, healthy, and secure environment for all residents.<sup>379</sup> Its planning and development principles focus on local government's crucial role in improving the quality of life for the residents as local government is considered to be "closest to the people".<sup>380</sup> Municipalities are therefore considered to be the major role players in service delivery and have a duty to ensure that environmental, economic and social development takes place.<sup>381</sup>

<sup>378</sup> eThekweni Municipality Integrated Development Plan Draft 2022/2023 Review 401.

<sup>379</sup> eThekweni Municipality Integrated Development Plan Draft 2022/2023 Review 19.

<sup>380</sup> eThekweni Municipality Integrated Development Plan Draft 2022/2023 Review 375.

<sup>381</sup> eThekweni Municipality Integrated Development Plan Draft 2022/2023 Review 375.

With the introduction to the two municipalities discussed above, the next section considers the findings.

### 4.3 Findings and Discussions

During the analysis, several themes were identified. The main themes were the challenges experienced with transaction timeframes, time consuming processes and other procedural challenges experienced. The themes can be divided into two categories. The first category addresses the processing of sale and lease transactions. The second category is a narrower consideration of the legislation applicable to the transactions and how the legislation affects social value delivery. In general, the results from the two municipalities were fairly similar and the findings have therefore been structured around the themes. Where there are differences between the findings of the two municipalities, they are highlighted below.

#### 4.3.1 Challenges Associated with the Municipal Sale and Lease Process

Participants from both municipalities highlighted numerous challenges experienced within the local government property environment, with some areas of overlap between participants. The main challenges relate to timeframes and procedures, which are discussed below.

##### 4.3.1.1 Timeframes

Participants were asked to provide average timeframes for completion of sale and lease transactions, as from the initiation of the sale and lease application up to the registration of the transfer of ownership at the Deeds Office, or the signature of the lease agreement respectively. All participants indicated that, as a general rule, sale transactions take longer to complete than lease transactions. There are a number of reasons for this, but the two main ones are the land use and deeds office registration processes required for sale transactions.

Participants from both municipalities highlighted that the time period for conclusion of lease transactions can vary quite significantly, depending on the type of lease transaction being undertaken. As an example, short-term lease transactions involving non-viable land, i.e., land which cannot be developed to function independently and

only has value to adjoining landowners, may, in some cases take six months to complete. More complex transactions may take a number of years to finalise.

Timeframes for lease transactions provided by City of Cape Town participants varied from between three months to two years. Participants explained that delegated approvals are in place for a limited number of minor transactions, which means that approvals have been delegated from Council to other committees or to senior officials. For such transactions, it could take three to four months to complete (participants CT1 and CT4). In contrast, significant and more complex transactions, for which delegated approvals are not in place, can take two years or more to finalise (participants CT3 and CT4). The common theme was that timeframes were heavily dependent on the nature and complexity of a transaction.

eThekweni Municipality participants indicated that, on average, lease transactions take about two years to complete. One participant from eThekweni municipality indicated that estimated timeframes varied between two to three years (participant EM4). A large portion of this time is taken up by the technical clearance process, which is an extensive process involving a technical investigation into the property followed by approval from the legal services department (participant EM1). Some of the participants from eThekweni Municipality (participants EM1 and EM2) indicated that it was very difficult to provide general timeframes, given the multiple steps and number of parties involved in the process, which create factors that are beyond the official's control. As a result, the simplest transactions may end up taking the longest and the most complicated may be completed quicker than expected.

City of Cape Town officials indicated that limited types of low value sale transactions may take less than a year to complete (participants CT4 and CT5). Having said that, participants from both municipalities indicated that more complex transactions take more than two years to finalise. Interviewees advised that several factors influence these timeframes, including the type of procurement process being followed (with tenders taking the longest), the public participation process, political intervention, and town planning processes.

The findings illustrate that time periods for undertaking transactions vary significantly and although general estimates can be determined, there are numerous factors that

can affect it, a number of which are beyond the municipality's control.<sup>382</sup> The findings also indicate that certain types of minor transactions take longer to complete at eThekweni Municipality than at the City of Cape Town. This appears to be, in part, due to the differences in how the steps to be followed are structured between the two municipalities but more significantly the use delegated authority for the approval of certain types of minor non-viable transactions at the City of Cape Town.

#### *4.3.1.2 Time-Consuming Aspects*

Participants were requested to identify the most time-consuming aspects of the sale and lease process. Their responses covered an array of areas including undertaking technical investigations, determination of whether a property is required for municipal services, the public participation process, the municipal approval process, and the tender process (including the verification of personal and financial information, as required by procurement policies). Town planning requirements were also referenced by participants from both municipalities, which would apply to those properties that do not have the necessary land use rights. As one participant explained (EM4), some transactions may involve several town planning processes, for example road closures, rezoning and sub-division. The town planning process in itself can end up taking a number of years to complete and would need to be finalised prior to the registration of a sale at the Deeds Office.

Several participants from both municipalities indicated that there was not a single event that they viewed as being the most time-consuming, but rather that the process, as a whole, with its multitude of requirements, is time consuming. One participant (EM2) explained that the transactions, in particular the tender process, encompasses a number of fields. In addition to being property management experts, officials are required to have expert knowledge in supply chain management and finance. Ensuring that all the different facets of the transaction align and are correct is both challenging and time consuming.

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<sup>382</sup> The procedural steps were discussed in section 2.5.1.4 of chapter 2, which also included indications of general timeframes around certain of the steps, such as obtaining approval from Council which in itself can take a few months to complete.

#### 4.3.1.3 Procedural Challenges

Interviewees were requested to identify the general challenges they encountered within the municipal property environment and, secondly, to identify challenges specific to the sale and lease approval process. As the answers were similar to both questions, they are addressed together in this section.<sup>383</sup>

A challenge identified by multiple participants from both municipalities is the balancing of the public engagement process,<sup>384</sup> which involves various stakeholders. As part of the public engagement process, different stakeholders, within different spheres of government, public organisations and the general public are consulted on the proposed transaction.<sup>385</sup> These stakeholders have different needs and priorities, which may come into conflict, leading to a protracted public participation process. As one participant (EM3) explained: “a sale in the normal commercial world would take a year at the most but with a municipality, because of the different parties involved in the process, it ends up being a very lengthy process and someone with a commercial plan may have to wait three years before they even start the project. These are the delays that are synonymous with municipal transactions”. Although the lengthy process is responsible for delays, it may also have positive implications. One of the participants (CT4) commented that allowing for multiple views to be considered through a public participation process ensures that the views of some interested parties, are not overlooked.

Participants from both municipalities identified the extensive legislation applicable to sale and lease transactions, leading to a myriad of processes to be concluded, as being a significant challenge.<sup>386</sup> An example was provided where a municipality was approached by a non-profit organisation (NPO) to acquire land for delivery of a social project to the community, but due to the lengthy approval process provided for in the legislation, the funding offer lapsed and the project was not delivered. As a result, the

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<sup>383</sup> Unsurprisingly, the challenges identified by the participants were not dissimilar to their responses above in section 4.3.1.2, in relation to most time-consuming aspects of the approval process.

<sup>384</sup> The requirement to undertake public participation are specified in regulations 6 and 38 of the Municipal Asset Transfer Regulations and sections 17, 18 and 21 of the Municipal Systems Act.

<sup>385</sup> The public participation process is discussed under step 2 of section 2.5.1.4 of chapter 2.

<sup>386</sup> The six-step process to be undertaken prior to the sale or lease of municipal immovable property is discussed in section 2.5.1.4 of chapter 2.

community missed out on the opportunity. The legislative constraints are examined in more detail under section 4.3.4 below.

Several participants identified the verification of applicants' personal and financial information to be an obstacle.<sup>387</sup> As an example, out of date or incorrect financial information, such as an expired tax clearance certificate, is provided by the applicant and as a result the process is delayed.

Overall, multiple challenges were identified, relating to a number of different aspects of the sale and lease process. This may in part be due to certain officials' roles focusing on certain aspects of the transaction process, but it also illustrates that there is not one exclusive area of challenge that stands out to participants but rather that there are multiple challenges encountered throughout the approval process. The challenge therefore lies in the approval process as a whole.

#### 4.3.2 Impact of the Identified Challenges

Interviewees were asked to consider what impact the challenges that they identified in the previous questions have on the lease and sale process. All interviewees agreed that the challenges impacted negatively on timeframes and cause delays to the finalisation of the transactions. This in turn delays service delivery.

One interviewee (CT3) explained that where there may be an initial appetite for a certain type of transaction from the market, the lengthy timeframe for finalisation of the transaction may lead to a loss of interest from investors or developers by the time the necessary processes have been completed. The interviewee further added that a delayed transaction can stall the entire project which could, in turn, lead to illegal occupation of the property as it stands vacant until the approval process is finalised. It was also highlighted that delays to the process can increase project costs, potentially making delivery thereof unfeasible. There are also financial implications for the municipality. The lengthy transaction process leads to a delay in income received from

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<sup>387</sup> The verification of an applicant's information includes ensuring that their tax affairs are in order, as provided for in regulation 43 of the Municipal Supply Chain Management Regulations. In addition, applicants also need to be registered on a national and municipal vendor database and be in good standing with the municipality.

sales and leases. This could, in turn, delay provision of certain municipal services due to lack of budget.

In contrast, another participant (CT4) indicated that the challenges could also have positive implications. By going through a number of channels prior to approval being obtained, a transaction is tested, and this leads to a well-founded decision, which may not always be achieved through a shorter process.

#### 4.3.3 Effect of the Challenges on the Delivery of Social Value

Participants were asked about the perceived effect that the challenges have on the delivery of social value to the community. Participants viewed the challenges to have a negative effect on the delivery of social value, such as a lengthy approval process leading to a loss of funding and therefore a loss of service delivery to the community. One of the participants (CT3) explained: “There is a housing shortage and surplus municipal properties are a tool to improve social value in society. If the challenges lead to the municipality not being able to best utilise the properties, then the community loses out on job creation (both for business purposes and social entrepreneurships) and opportunities to provide housing, rehabilitation centres and other benefits that come with developments such as social care facilities”.

The longer the sale and lease process takes, the bigger the delay in communities receiving the benefits e.g., certain developments may lead to job creation. This has a knock-on effect of being able to pay for children’s education by earning an income. Another participant (EM1) weighed the application process against municipal targets to transform and empower previously disadvantaged members of the community. The extensive application process (including the submission of tender documents and meeting all the financial and vetting requirements in terms of supply chain management procedures) often has the opposite of the intended effect as they do not allow previously disadvantaged members of the community to compete, due to complexities and extensive administrative requirements involved in the tender process.<sup>388</sup>

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<sup>388</sup> The Municipal Finance Management Act and Municipal Supply Chain Management Regulations require municipalities to implement procurement policies, which amongst other things regulate the

Not all effects were considered to be negative. One participant (CT4) considered the effects to be twofold: “It may negatively affect the timeframe of the end result but the more engagement you have the better you understand and are able to assess the needs of the community”.

#### 4.3.4 Applicable Legislation

Interviewees were asked to identify the legislation applicable to municipal sale and lease transactions. All participants referenced the Municipal Finance Management Act<sup>389</sup> and the Municipal Asset Transfer Regulations.<sup>390</sup> Participants also identified the Constitution<sup>391</sup>, Supply Chain Management Regulations<sup>392</sup>, land use bylaws applicable to the municipality, Deeds Registries Act,<sup>393</sup> Land Survey Act<sup>394</sup> and internal departmental policies and procedures.<sup>395</sup>

As discussed in chapter 2, the list of applicable legislation is very extensive and indicates the complexity of overlapping legislation and policies that officials need to understand and implement.<sup>396</sup> It covers numerous areas including municipal finance management, property management, conveyancing, surveying, and procurement.

##### 4.3.4.1 *The Objectives, Interpretation, and Application of the Legislation*

The study’s first research objective was to identify the applicable legislation and to determine the objectives of the legislation. Interview questions relating to the objectives and interpretation of the legislation were aimed at identifying those legislative objectives. All participants agreed that the overall objectives of the identified legislation are clear and are aimed primarily at creating a fair process and

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tender process. There is often a cost to obtain a copy of the tender document from the municipality. The tender documents are not necessarily user friendly, often run into hundreds of pages and require extensive information to be provided and numerous forms to be completed. All these factors add to excluding members of the public who do not have the necessary funds and skills to complete the complex documents from applying for tenders.

<sup>389</sup> Local Government: Municipal Finance Management Act.

<sup>390</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008].

<sup>391</sup> Constitution, 1996.

<sup>392</sup> Municipal Supply Chain Management Regulations [GN R 868 in GG 27636 of 01-07-2005].

<sup>393</sup> Deeds Registries Act 47 of 1937.

<sup>394</sup> Land Survey Act 8 of 1997.

<sup>395</sup> The legislation identified by participants is discussed in detail in section 2.4 of chapter 2.

<sup>396</sup> See section 2.5 of chapter 2 for a discussion of the applicable legislation.

avoiding corruption. Although the objectives of the legislation were considered to be apparent and supported by participants, the perceived duplications in the process, rigidity thereof and extensive time to complete the transactions created frustration. The duplications arise both within a single piece of legislation as well as through the application and interaction of multiple pieces of legislation. A few of the participants, from both municipalities, also indicated that they have observed some inconsistencies between the legal requirements specified in different legislation. Inflexible legislation and policies are not unique to South Africa. Van Den Beemt-Tjeerdsma, reflected on the need to adapt inflexible legislation and policies applicable to municipalities in the Netherlands, in order to better allow them to achieve their targets.<sup>397</sup>

The majority of the participants, from both municipalities, were of the view that the interpretation of the Municipal Finance Management Act and associated regulations is generally fairly uncomplicated. A few participants from both municipalities highlighted an initial difficulty to interpret the legislation when it was first enacted, but over time, a clear understanding was developed, and participants therefore consider the present position to be uncomplicated. The challenge arises with the added application of other legislation, such as procurement legislation, which creates overlap and inconsistencies. Several participants, from both municipalities, consider procurement legislation to be more suited to procuring goods and services and less applicable to the alienation of immovable assets and the generation of income.<sup>398</sup>

Participants were also asked to comment on whether the legislation was straightforward to apply in practice. They confirmed that the application of the legislation was simple in general but certain transactions were cumbersome as some of the required steps were viewed as repetitive. One participant (CT4) explained that a single property transaction may require different approvals from numerous committees on three separate occasions in the process.<sup>399</sup> Participants also indicated

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<sup>397</sup> Van Den Beemt-Tjeerdsma & Van Den Beemt-Tjeerdsma (2016) *Journal of Corporate Real Estate* 140.

<sup>398</sup> As discussed in chapter 2, the Municipal Finance Management Act confirms that the supply chain requirements are not only applicable to acquisition of goods and services but also includes the disposal of assets.

<sup>399</sup> The steps are discussed in chapter 2 and include seeking approval to undertake public participation, in principle approval for the transaction followed by final approval, adding up to approval being sought on three separate occasions.

that they have come across types of applications that are not sufficiently covered by the legislation, creating uncertainty. Kaganova advises that in order for local government property to function optimally, national legislation needs to be supportive.<sup>400</sup> Repetitive steps and grey areas not sufficiently covered by legislation therefore need to be addressed.

#### *4.3.4.2 Enabling Legislative Environment for the Delivery of Social Value*

The second research objective was to explore whether social value objectives are met through property transactions. Participants had mixed views about whether the legislation applicable to municipal sale and lease transactions encouraged social value creation. Several of the participants, from both municipalities, pointed out that there were certain provisions in the legislation that provided an opportunity for social value creation. A few participants highlighted the provision within the legislation for transactions, in certain situations, to be at a discounted value as opposed to requiring full market value for an asset.<sup>401</sup> In addition, the public tender process is perceived to encourage a fair process by allowing all members of the public to compete.<sup>402</sup>

Several participants indicated that while the legislation makes provision for social value creation, the lengthy procedural requirements, as provided for in the legislation, had a negative impact on the practical delivery of social value to the community. Participants pointed to the delays inherent in undertaking the tender process and the extensive procurement verification of information processes as potentially delaying the social value that may be created by a transaction. In addition, small businesses may not be able to compete effectively with larger businesses when submitting tenders, due to the onerous tender requirements (including detailed documentation required as well as the financial verification requirements). Participants were of the view that specialist knowledge was required to successfully complete some of the tender documents, thereby potentially excluding some of the smaller businesses.

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<sup>400</sup> Kaganova & Nayyar-Stone (2000) *The Journal of Real Estate Portfolio Management* 325.

<sup>401</sup> The relevant part is regulation 13(2) of the Municipal Asset Management Regulations and provides for situations where a municipality transacts at less than market value where it is in the public interest to do so, such as in cases where a need is created by the circumstances of the impoverished.

<sup>402</sup> Section 12 of the Municipal Supply Chain Management Regulations provides for a competitive bidding process to be followed.

#### 4.3.4.3 Legislative Shortcomings

The majority of the participants were of the view that, in general, the legislation had some shortcomings, in particular in relation to the extensive prescribed procedural steps.<sup>403</sup> This reinforces the earlier views expressed that some of the steps were considered repetitive, or too onerous for certain types of smaller transactions.<sup>404</sup> One participant (EM4) explained that there is so much red tape and reporting processes that must take place for the conclusion of a lease or sale, no matter the type of transaction involved. This means that the simplest short-term lease transaction, has the same requirements as a long-term commercial transaction involving a significant property right.

Other identified shortcomings are legislative provisions that are inconsistent with general property norms. Two provided examples were, firstly, the requirement for a review of lease agreements on a three-yearly basis<sup>405</sup> and secondly, certain restrictions on sub-letting<sup>406</sup> by the lessee. The applicable legislation and transactional implications were discussed in chapter 2.<sup>407</sup> For long-term leases, especially those involving developments, such restrictive clauses may impact on a development project's viability and ability to obtain funding.

One of the participants (CT5) described the legislation as self-defeating: "The goal is service delivery, but it takes too long to achieve due to all the steps that have to be followed. This does not mean that the steps should not be followed but there are better ways to safeguard government property against corruption without having to prolong the process".

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<sup>403</sup> A detailed discussion of the six steps that need to be adhered to prior to the sale and lease of municipal property is discussed in section 4.1.4 of chapter 2.

<sup>404</sup> One of the examples provided in chapter 2 was of a small grass verge next to a residential area which the owner wishes to acquire or lease for gardening or security purposes. Such a property would not hold an interest to external parties but only to adjoining owners.

<sup>405</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], regs 17(3)(a)(iii) & 45(3)(a)(iii).

<sup>406</sup> Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008], reg 45(2)(a)(x).

<sup>407</sup> See section 2.5 of chapter 2 for a detailed discussion of the legislation applicable to sale and lease transactions involving municipal property.

#### 4.3.5 Recommendations for Legislative Reform

The final research objective considered whether legislative and procedural improvements could improve social value delivery. Participants were requested to provide recommendations to improve the legislative framework relating to the sale and lease process. Several participants recommended that the overall approval process be reviewed and simplified to allow for a shorter turnaround time, in particular for what they considered to be minor transactions. As one participant (CT5) explained: “The objectives are clear in terms of what the legislation wants to achieve but there should be opportunity to allow for speeding up of service delivery within the process of certain fixed steps that you have to go through and potential repetition in the process. If this could be minimized and some of the steps dealt with simultaneously or delegated, the process would be improved”. Put differently, another participant (EM4) referred to it as “baking the cake several times” and recommended simpler and quicker process by removing the repetitive steps.

It was also recommended that municipalities should submit suggested legislative improvements to the responsible sphere of government for consideration. Additionally, it was suggested that the steps that cause significant delays (such as market valuations, determination of whether land is surplus to requirements and supply chain processes) should be reviewed to determine how their timeframes can be shortened.

Another suggested solution was to delegate the approval of minor transactions to officials or a single committee, thereby allowing for a shorter turnaround time for minor transactions. This would also release resources by allowing them to focus on major transactions and those transactions that aim to improve social value.

#### 4.4 Conclusion

Timeframes for the conclusion of sale and lease transactions can vary significantly. It is therefore difficult to provide an estimated time for a transaction. Overall, sale transactions tend to take longer than lease transactions to complete. A number of factors, many of which are outside the municipal officials’ control, can impact the timeframe of sale and lease transactions. As a result, transactions that appear

straightforward may end up taking longer than complex transactions. The difficulties highlighted here also impede parties' ability to undertake reliable project planning.

Stakeholder engagement and town planning processes are two examples of factors that can significantly affect transaction timeframes. This is supported by Zavadskas et al, who point to the extensive procedural requirements and differing community needs as two significant challenges faced by local government property practitioners.<sup>408</sup>

Participants did not identify one single key aspect as the cause of challenges and delays but rather pointed to a number of different steps within the process which they considered to be very time-consuming. This is indicative that the extent of all the requirements that need to be met, i.e., the process as a whole rather than one specific problematic step creates the main challenge. This aligns with the views of Guarini et al, that the local government property sector, which includes procedural, legislative and bureaucratic steps, creates a complicated environment within which municipalities must operate.<sup>409</sup> This issue is also highlighted by Kaganova, who explains that if parties attempt to fast-track the process to comply with short timeframes, then given the complexities of local government property transactions, contractual issues tend to arise later.<sup>410</sup>

Multiple pieces of legislation within a number of different sectors are applicable to the sale and lease of municipal immovable property. Although the objectives of the legislation are clear, there are areas that have not been sufficiently addressed in the legislation as well as areas of overlap. This corresponds with Kaganova's remarks that local government property transactions need to pass through a significant number of steps, with the procurement step taking a significant amount of time to complete.<sup>411</sup> Some of the legislation may have been drafted primarily with other types of transactions in mind, such as supply chain management legislation, which is aimed at the acquisition of goods and services rather than the sale and lease of municipal

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<sup>408</sup> Zavadskas E, Turskis Z, Sliogenerie J & Vilutiene T "An integrated assessment of the municipal buildings' use including sustainability criteria" (2021) 67 *Sustainable Cities and Society* 11.

<sup>409</sup> Guarini et al (2018) *Sustainability* 1.

<sup>410</sup> Kaganova (2010) *Real Estate Issues* 31.

<sup>411</sup> Kaganova (2010) *Real Estate Issues* 31.

immovable property to third parties. Applying such legislation to sale and lease transactions creates challenges as they do not necessarily fit the mould.

Whether the legislation achieves social value delivery is less clear. Certain provisions are aimed at the delivery of social value to the community, but the extensive and lengthy processes dilute social value delivery. Steytler and De Visser point to the potential contradiction between applying social value considerations on the one hand and the requirement of section 14(5) of the MFMA to procure the highest price.<sup>412</sup>

Participants agreed that the existing processes, as provided for in the legislation, should be shortened and streamlined. Some of the required steps were considered to be similar, leading to a duplication of processes, and unnecessary extensions of timeframes. This view is supported by Kaganova, who recommends that a more flexible legal framework be implemented, especially for lower-impact transactions.<sup>413</sup>

Participants also recommended that the approval process for minor transactions should be simplified and delegated, which would unburden resources to focus on more urgent and/or complex transactions. Kaganova proposes that routine property functions should be delegated to more junior municipal officials to help reduce delays.<sup>414</sup> The delays lead to negative effects such as projects never materialising due to funding being lost or no longer being feasible. This may, in turn, have a negative effect on the delivery of social value to the community.

The study further identified that some of the local government legislative requirements are inconsistent with property norms. The end result is that projects become unviable, and this has a knock-on effect on social value creation. Kaganova recommends that government regulations that do not support general property norms should be reviewed and improved.<sup>415</sup>

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<sup>412</sup> Steytler & De Visser *Local Government Law* 1-31.

<sup>413</sup> Kaganova & Nayyar-Stone (2000) *The Journal of Real Estate Portfolio Management* 324.

<sup>414</sup> Kaganova & Nayyar-Stone (2000) *The Journal of Real Estate Portfolio Management* 324.

<sup>415</sup> Kaganova (2010) *Real Estate Issues* 31.

Local government sale and lease transactions need to meet a number of legal requirements provided for in different pieces of legislation.<sup>416</sup> Although the objectives of the legislation, which is to deter corruption, are supported, the lengthy transaction process is considered to have a negative impact on local government's constitutional objectives<sup>417</sup> to provide social value to the local community.

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<sup>416</sup> Local Government: Municipal Finance Management Act; Local Government: Municipal Finance Management Act, 2003, Municipal Asset Transfer Regulations [GN R 878 in GG 31346 of 22-08-2008]; Municipal Supply Chain Management Regulations [GN R 868 in GG 27636 of 01-07-2005].

<sup>417</sup> Constitution, 1996 s 152(1).

## Chapter 5: Conclusion and Recommendations

### 5.1 Introduction

This study set out to establish whether municipal social value objectives, as provided for in the Constitution, are achievable when applying the legislation applicable to the sale and lease of municipal immovable property to third parties. The study had three main objectives. Firstly, it aimed to identify the legislation applicable to municipal immovable property transactions and the objectives thereof. Secondly, it examined the extent to which social value objectives are met when municipalities undertake these property transactions. Lastly, it investigated whether the legislative framework could be improved to enhance social value delivery.

This Chapter presents an overview of the key findings relating to each objective, together with some concluding remarks. It also provides recommendations to improve social value delivery, and in particular, it considers how shortcomings identified in the legislation may be addressed.

### 5.2 Immovable Property Legislation (Objective 1)

The first objective of this study was to identify the legislation applicable to sale and lease transactions involving municipal immovable property.<sup>418</sup> This enabled a determination of the objectives of the applicable legislation and its intended aims. The provisions have a common theme - to curb corruption and ensure transparency and fairness of process.

As discussed in chapter 2,<sup>419</sup> South African municipal property transactions are subject to extensive national legislation, falling within a number of different areas including financial management, procurement, and conveyancing. In addition to the numerous

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<sup>418</sup> The applicable legislation is discussed in section 2.5 of chapter 2. The most comprehensive provisions are found in the Municipal Asset Transfer Regulations but as set out in section 2.5.2, there are also a number of other acts and regulations that are applicable.

<sup>419</sup> See section 2.5.1 of chapter 2 for a discussion of the Municipal Finance Management Act and Municipal Asset Transfer Regulations and section 2.5.2 for an analysis of other applicable legislation including procurement, conveyancing, and municipal legislation.

statutes and regulations applicable to property transactions, municipalities also have planning by-laws and property policies that must be considered.

The Municipal Finance Management Act, together with the Municipal Asset Transfer Regulations, provide for detailed steps to be followed and approvals to be obtained prior to authorisation of transactions. The objective of the legislation is to ensure transparency and fairness of municipal financial processes.<sup>420</sup> As a result, the legislation is very extensive. It aims to ensure that all aspects of the transaction process are specified in detail, leaving no room for corruption.

Procurement legislation<sup>421</sup> has similar objectives, aimed at ensuring that the procurement of goods and services by a municipality are undertaken in a fair and competitive manner.<sup>422</sup> Its requirements are also extensive. The sale and lease of municipal property cannot strictly be considered to fall within the definition of procurement of goods and services and applying the legislation to property transactions, therefore, leads to certain challenges.

A further obstacle lies in ensuring that all legislative requirements are met and that inconsistencies are not created in the process. This leads to a very lengthy approval process, which may result in missed opportunities.

### 5.3 Achieving Social Value Objectives (Objective 2)

The Constitution tasks municipalities with service provision to communities and the promotion of social and economic development.<sup>423</sup> When municipalities dispose of property, it also provides an opportunity to deliver on their constitutional objectives, through social value creation in the community. The study identified and analysed the challenges faced by local government practitioners when undertaking sale and lease transactions. Specifically, the second objective of the study considered whether the

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<sup>420</sup> The aims and objectives of the legislation are discussed in section 2.5.1.1 of chapter 2.

<sup>421</sup> Municipal Supply Chain Management Regulations [GN R 868 in GG 27636 of 01-07-2005]; Preferential Procurement Framework Act; Preferential Procurement Regulations [GN R 2721 in GG 47452 of 04-11-2022].

<sup>422</sup> See discussion of the procurement legislation in section 2.5.2.2 of chapter 2.

<sup>423</sup> Constitution, 1996, s152.

legislation applicable to municipal property transactions encourages social value delivery.

In addition to constitutional objectives, the importance of social value delivery has also been reinforced through the adoption of the 17 SDGs by leaders from all the United Nations member states in 2015. A number of these SDGs are applicable to the property sector. In particular, SDG11 provides for the creation of cities that are “inclusive, safe, resilient and sustainable”.<sup>424</sup> The SDGs reinforce the role that the property sector has to play in delivery of social value. Municipalities, as providers of services to the community, play an essential part in the provision of social value and must ensure that it considers social value in all aspects of carrying out its functions.

As discussed in chapter 2 of the dissertation, the legislative steps to be followed prior to the sale or lease of municipal property is extensive. Each of these individual steps can take a few months or more to complete, culminating in a very lengthy approval process, which often takes a number of years to finalise. The study participants did not identify one specific aspect of the approval process as being challenging but rather that cumulatively the multiple steps that need to be followed cause a significant delay to the process. Even minor transactions need to comply with all the steps. Very little distinction is made in the application of the legislation between social and commercial transactions. This results in the creation of bottlenecks and backlogs as the limited resources available need to be applied to all transaction types. There is also overlap in the different legislative regimes that are in place. Even within the Municipal Asset Transfer Regulations, a transaction may need to be referred to the same committee<sup>425</sup> for approval on multiple occasions. These factors negatively impact on social value delivery.

The study participants regard the purpose of the municipal property legislation to be clear and worthy of support. However, the complex application of the legislation is considered to lead to a delay or loss of social value opportunities, which goes against municipal objectives provided for in the Constitution.

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<sup>424</sup> Transforming Our World: *The 2030 Agenda for Sustainable Development* (2015); De Paola et al (2021) *Sustainability* 5.

<sup>425</sup> For example, the municipal council.

While the legislation applicable to municipal property transactions makes certain provisions and allowances for social value delivery,<sup>426</sup> its application creates some challenges. A clear example of this is the requirement to undertake a competitive process. The requirement is aimed at allowing all participants to submit applications in an open and fair manner and on equal footing.<sup>427</sup> However, due to the complicated and technical tender requirements that must be met, which often requires the assistance of a professional team, a number of applicants end up being excluded from the tender process due to their inability to afford professional services.<sup>428</sup>

Overall, it is considered that the delivery of social value to the local community through the sale and lease of municipal properties is less than optimal. Improvements and solutions should be explored.

#### 5.4 Procedural Improvements to Facilitate Social Value Creation (Objective 3)

Following the identification of challenges in relation to the application of the legislation and social value creation, the third and final study objective investigates whether the delivery of social value could be enhanced.

The legislative approval process that must be followed, as provided for in the Municipal Asset Transfer Regulations, does not distinguish between social value transactions and purely commercial transactions. All steps are to be concluded irrespective of whether the sale or lease will be delivering on an important community social need or not. There is no opportunity to prioritise transactions that will lead to social value creation for the community. As a result, social value opportunities that would benefit the community may be lost due to the lengthy delays brought about by the extended approval process. A shorter, streamlined process must be provided for transactions aimed at social value delivery. This will encourage participation by those who may otherwise be excluded or discouraged from taking part in such transactions due to financial and technical constraints.

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<sup>426</sup> For example, as discussed in section 2.5.1.4 of chapter 2, transactions may be undertaken at below market value in certain circumstances.

<sup>427</sup> The objectives have been discussed in section 5.2 above.

<sup>428</sup> See section 2.5.2.2 of chapter 2 for details of the legislation and section 4.3.4.2 of chapter 4 for a discussion of the challenges in relation to its application to the tender process.

As discussed in chapter 2 of the dissertation,<sup>429</sup> certain financial thresholds were set in 2008, which determined whether approvals for transactions could be delegated and whether certain additional approvals would be required. Those financial thresholds have not been updated since they were set in 2008. The outdated legislation results in thresholds that are out of touch with current market values.

Flowing from the proposed improvements discussed in this section, the next section provides some key recommendations.

## 5.5 Recommendations

In general, current property legislation and its objectives are worthy of support. It is aimed at avoiding corruption and opening municipal property transactions up to a wider pool of participants. The critique arises around the duplication of processes, which cause delays as well as the failure to provide for a simpler process for minor transactions. Additionally, procurement legislation, which is more suited to acquisition of goods and services, is not tailored to suit the disposal of municipal property. Therefore, such legislation is difficult to apply to disposal transactions. The appropriateness of applying lengthy procurement processes to the sale and lease of municipal property should be reconsidered.

It is further recommended that minor transactions should follow a shorter approval process to allow for resources to be more appropriately applied. In addition, municipalities should ensure that decision-making powers are delegated to the extent permitted by the regulations, to enable decisions of minor transactions to be taken by departmental officials as opposed to required approval from the municipal council. This will free up resources to fast-track transactions identified to address important community needs.

It is also recommended that the legislation be reviewed to address existing shortcomings. Five main shortcomings are highlighted in this study. First, the legislative provisions should be streamlined to remove duplication.<sup>430</sup> Second, the relevant legislation should deal with commercial and social transactions separately to

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<sup>429</sup> See section 2.5.1.4 of chapter 2 for details relating to transactional thresholds.

<sup>430</sup> See section 4.3.1.2 of chapter 4 for a discussion of the process and identification of the duplications.

allow for differentiation and tailored processes.<sup>431</sup> Third, the revised legislation must allow for the prioritisation of those types of transactions that create social value for the local community.<sup>432</sup> Fourth, the definitions of non-significant and non-high value assets, which were set over a decade ago should be revisited to bring them in line with current market values.<sup>433</sup> In addition, regular reviews and updates of these thresholds are recommended to align with prevailing market conditions. Lastly, those requirements that are inconsistent with property norms, should be revisited.<sup>434</sup> This would include lifting the prohibition on subletting and assignment in lease agreements.

## 5.6 Reflections on the Generalisability of the Research

The study considered the processes followed and challenges experienced by South African metropolitan municipalities when undertaking sale and lease transactions. The study focused on well-functioning metropolitan municipalities. Well-functioning municipalities were selected to exclude the impact of additional challenges faced by poor performing municipalities. These additional challenges include unavailability of budget, insufficient human resources, and lack of strong management. Even with all of the resources available to them, the well-functioning municipalities are experiencing challenges with social value delivery through property transactions.

As the legislation is applicable to all South African municipalities, it is considered that similar experiences may also be shared by smaller and poor-performing municipalities. These challenges will only be exacerbated for small or poor-performing municipalities due to the additional challenges discussed above.

## 5.7 Concluding Comments and Further Research

In answering the research question, this study illustrates that municipal immovable property transactions do not provide optimal social value delivery. To a large extent, this is due to the extensive and restrictive legislation that governs these transactions. Some of the steps to be followed are time consuming and there is a measure of overlap

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<sup>431</sup> This is discussed in section 4.3.1.1 of chapter 4.

<sup>432</sup> See section 4.3.4.3 of chapter 4.

<sup>433</sup> See discussion in section 2.5.14 of chapter 2.

<sup>434</sup> See section 4.3.4.3 of chapter 4.

between the various steps, leading to protracted transactions. This results in missed opportunities to create social value.

As this study focused on well-performing municipalities, further research is necessary to determine other constraints that may affect poor-performing municipalities, such as a lack of financial management. Another area of research would be a comparison between smaller, i.e., district and local municipalities and metropolitan municipalities, in terms of their ability to achieve social value delivery. Legislative impediments are not the only factors that affect social value delivery and further research of other factors that may impact on social value delivery should also be explored. The extent to which procurement legislation could be adapted to better address the sale of municipal property is also a further area to be investigated.

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# Annexures

## Annexure 1: Ethics Clearance

Application for Approval of Ethics in Research (EIR) Projects  
Faculty of Engineering and the Built Environment, University of Cape Town

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### ETHICS APPLICATION FORM

**Please Note:**  
Any person planning to undertake research in the Faculty of Engineering and the Built Environment (EBE) at the University of Cape Town is required to complete this form before collecting or analysing data. The objective of submitting this application prior to embarking on research is to ensure that the highest ethical standards in research, conducted under the auspices of the EBE Faculty, are met. Please ensure that you have read, and understood the EBE Ethics in Research Handbook (available from the UCT EBE, Research Ethics website) prior to completing this application form: <http://www.ebe.uct.ac.za/ebe/research/ethics1>

APPLICANT'S DETAILS	
Name of principal researcher, student or external applicant	Liezl Isabel Emsley
Department	Construction Economics & Management
Preferred email address of applicant:	EMSLIE001@myuct.ac.za
If Student	Your Degree: e.g., MSc, PhD, etc.
	Credit Value of Research: e.g., 60/120/180/360 etc.
	Name of Supervisor (if supervised):
If this is a research contract, indicate the source of funding/sponsorship	Not applicable
Project Title	The Legal Complexities of Municipal Immovable Property Transactions in the context of Social Value Creation

**I hereby undertake to carry out my research in such a way that:**

- there is no apparent legal objection to the nature or the method of research; and
- the research will not compromise staff or students or the other responsibilities of the University;
- the stated objective will be achieved, and the findings will have a high degree of validity;
- limitations and alternative interpretations will be considered;
- the findings could be subject to peer review and publicly available; and
- I will comply with the conventions of copyright and avoid any practice that would constitute plagiarism.

APPLICATION BY	Full name	Signature	Date
Principal Researcher/ Student/External applicant	Liezl Isabel Emsley		09.06.2022

SUPPORTED BY	Full name	Signature	Date
Supervisor (where applicable)	Louie van Schalkwyk		17.06.2022

APPROVED BY	Full name	Signature	Date
HOD (or delegated nominee) Final authority for all applicants who have answered NO to all questions in Section 1; and for all Undergraduate research (including Honours).	Dr. Frank K. Ametefe		2022/07/05
Chair: Faculty EIR Committee For applicants other than undergraduate students who have answered YES to any of the questions in Section 1.			

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## Annexure 2: Case Study Protocol

### **A. Introduction to the case study and purpose of the protocol**

The purpose of the protocol is to set out the data collection procedures applicable to this study.

### **B. Data collection procedures**

#### **a. Potential case study participants**

Two municipalities have agreed to take part in the research – City of Cape Town and eThekweni Municipality. The study involves municipal staff at senior professional officer level and above who, as part of their role at the municipality, undertake sale and/or lease transactions relating to immovable property owned by municipalities on a frequent basis.

#### **b. Data collection plan**

Primary data will be collected through semi structured interviews. Interviews are to be undertaken electronically, via MS Teams. Interviews are expected to take approximately 40 minutes. Prior to interviews, the managers of the property department will be approached for guidance on identifying branch structures, qualifying staff and contact details.

#### **c. Preparation**

Prior to interviews, ensure that participant has completed consent form and accepted meeting request. Also check that participant is familiar with the MS Teams meeting format and offer to run a meeting test where they are not.

For the interview: ensure that interview guide is to hand.

### **C. Outline of the case study**

Interview commences with brief overview of the study (including discussion of consent form) followed by confirmation that participants meet eligibility criteria.

Participants are also requested to provide a brief overview of their qualifications and experience to assess their eligibility. This is followed by the interview questions which are divided into two sections. Section 1 considers the overall sale and lease process involving municipal immovable property while section 2 focuses on the legislation applicable to the sale and lease process.

The expected interview outcome is to have a better understanding of the experiences of municipal officials who undertake sale and lease transactions and in particular whether they consider the process to encourage social value.

#### **D. Case study questions**

See interview guide for interview questions.

#### **E. Evaluation**

Check that interview information has been accurately captured.

Ensure that information is securely stored to allow access to review and evaluate.

Test reliability through cross-comparison.

## Annexure 3: Interview Guide

### **Interview Guideline**

The interviews are intended for municipal staff at senior professional officer level and above who, as part of their role at the municipality, undertake sale and/or lease transactions relating to immovable property owned by municipalities on a frequent basis.

To allow for elaborations and clarifications, the interview format will not follow a set questionnaire. I intend to cover the following topics during each interview:

#### **Background: role and how long you have been in the role**

#### **PART A: Processing of transactions relating to the sale and lease of municipal immovable property to third parties (excluding organs of state)**

1. As part of your role at the municipality, do you undertake transactions involving the sale of municipal immovable property to third parties (that are not organs of state)?
2. How frequently do you undertake these types of transactions?
3. As part of your role at the municipality, do you undertake transactions involving the leasing of municipal immovable property to third parties (that are not organs of state)?
4. How frequently do you undertake these types of transactions?
5. How long does it generally take you to complete a lease transaction, from initiation of the transaction to signature of the lease agreement? (If it varies significantly, interviewee to provide a few examples of types of lease transactions and timeframes applicable to them).

6. How long does it generally take you to complete a sale transaction, from initiation of the transaction to registration of the sale? (If it varies significantly, interviewee to provide a few examples of types of sale transactions and timeframes applicable to them).
7. What do you consider to be the main challenges in undertaking municipal sale and lease transactions with third parties?
8. Which parts of the transaction process do you consider to be the most challenging and why?
9. Which parts of the transaction process do you consider to be the most time consuming and why?
10. What is the impact of these challenges on the transaction process?
11. What are the implications of these challenges on the delivery of social value to the community?

**PART B: The legislation applicable to transactions involving the sale and lease of municipal immovable property to third parties**

12. What legislation do you consider to be applicable to sale and lease transactions relating to municipal immovable property transactions?
13. In your view, are the objectives of the legislation clear? (Elaborate on reasons for the answer).
14. Do you consider the legislation applicable to the sale and lease of municipal immovable property to be simple to interpret and understand and why?
15. In your opinion, is the legislation applicable to the sale and lease of municipal immovable property straightforward to apply in practice, when processing

applications for sale and lease of municipal immovable property to third parties and why? (Elaborate on reasons for the answer)

16. In your view, do the processes for undertaking sale and lease transactions, as provided for in the legislation, allow for / encourage social-value creation and why? (Elaborate on reasons for the answer)

17. What do you consider to be the main shortcomings (if any) of the legislation applicable to transactions involving the sale and lease of municipal immovable property to third parties?

18. Do you have any recommendations to improve the legislative framework relating to the sale and lease of municipal immovable property to third parties?

## Annexure 4: Informed Consent Letter



### CONSENT TO PARTICIPATE IN RESEARCH

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**Study title:** The Legislative Complexities of Municipal Property Transactions in the context of Social Value Creation

**Supervisor:** Dr Louie van Schalkwyk, Senior Lecturer: Department of Construction Economics & Management, University of Cape Town, T: (+27) 021 650 2189 and  
E: [louie.vanschalkwyk@uct.ac.za](mailto:louie.vanschalkwyk@uct.ac.za).

**Student Researcher:** Ms. Liezl Emsley, MSc: Property Studies student, University of Cape Town, T: 082 825 8401 and E: [EMSLIE001@myuct.ac.za](mailto:EMSLIE001@myuct.ac.za)

#### 1. PURPOSE OF THE STUDY

I am currently undertaking my master's degree in Property Studies, at the Department of Construction Economics & Management, University of Cape Town. As part of my thesis, I am conducting a study. The study aims to investigate sale and lease transactions of municipal immovable property to third parties at well-functioning metro municipalities within South Africa. The study considers whether the various pieces of legislation applicable to these transactions are conducive to the delivery of social value to local communities.

You were selected as a possible participant in this study because you are employed at the municipality and are involved with sale and/or lease transactions involving municipal immovable property.

#### 2. PROCEDURES

If you volunteer to participate in this study, I will ask you to take part in an interview. The interview will take approximately 30-40 minutes to complete and if you consent, I may contact you for follow-up questions.

### **3. POTENTIAL RISKS**

No foreseen risks. Interviewees are made aware that I am an employee of the City of Cape Town, employed as a project manager within the Property Management Department. No conflicts of interests or risks are foreseen but participants are entitled to withdraw at any stage should they feel uncomfortable for any reason.

### **4. POTENTIAL BENEFITS TO SUBJECTS AND/OR TO SOCIETY**

No compensation will be payable for participation, but your feedback will assist with obtaining a better understanding on the challenges faced by local government property management practitioners when undertaking immovable property transactions with third parties.

### **5. CONFIDENTIALITY**

Any information that is obtained in connection with this study that can identify you, will remain confidential and will be disclosed only with your permission or as required by law. Your name will not appear on any of the data collected and a unique identification number will be allocated to you to ensure confidentiality. The data will remain secure and only myself and my supervisor will have access to it.

Subject to your consent, interviews will be recorded. Only the interviewer will have access to the recordings, and you will have the right to review your recording, upon request. The purpose of the recordings is to ensure accurate reporting. The recordings will be deleted as soon as they are no longer required.

### **6. PARTICIPATION AND WITHDRAWAL**

You can choose whether to be in this study or not. If you volunteer to be in this study, you may withdraw at any time without consequences of any kind. You may also refuse to answer any questions you do not want to answer and remain in the study. You may be withdrawn from this research if circumstances arise which warrant doing so.

**7. IDENTIFICATION OF INVESTIGATORS**

If you have any questions or concerns about the research, please feel free to contact me or my supervisor.

**8. RIGHTS OF RESEARCH SUBJECTS**

You may withdraw your consent at any time and discontinue participation without penalty. You are not waiving any legal claims, rights or remedies because of your participation in this research study. If you have questions regarding your rights as a research subject, you may contact my supervisor (details provided on page 1).

**SIGNATURE OF RESEARCH SUBJECT OR LEGAL REPRESENTATIVE**

The information above was described to me by Liezl Emsley in English and I am in command of this language. I was given the opportunity to ask questions and these questions were answered to my satisfaction.

I hereby consent voluntarily to participate in this study. I have been given a copy of this form.

\_\_\_\_\_  
**Name of Participant**

\_\_\_\_\_  
**Signature of Participant**

\_\_\_\_\_  
**Date**

**SIGNATURE OF INVESTIGATOR**

I declare that I explained the information given in this document to \_\_\_\_\_ [*name of the participant*]. [*He/she*] was encouraged and given ample time to ask me any questions. This conversation was conducted in English and no translator was used.

\_\_\_\_\_  
**Signature of Investigator**

\_\_\_\_\_  
**Date**