

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 1926/2008

In the matter between:

**WAENHUISKRANS ARNISTON RATEPAYERS  
ASSOCIATION**

First Applicant

**WAENHUISKRANS ACTION GROUP**

Second Applicant

and

**VERREWEIDE EIENDOMSONTWIKKELING (EDMS) BPK**

First Respondent

**CAPE AGULHAS MUNICIPALITY**

Second Respondent

**THE REGISTRAR OF DEEDS**

Third Respondent

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**JUDGMENT**

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DE SWARDT, A J:

1. Waenhuiskrans, or Arniston as it is also known, is a small, picturesque and rather charming seaside village on the Southern Cape coast, close to

Bredasdorp and east of Cape Agulhas. It was named Arniston on account of the stranding of a ship by that name close to the village in 1815. The name Waenhuiskrans was given to it, because there is a large cave close to the village which is accessible at low tide.

2. The coast along which the village is situated, has always been good for fishing and along its shores are rock fish traps which date back to prehistoric times. It has long been home to a fishing community and the old area of the town where fishermen have traditionally resided, known as Kassiesbaai, has been declared a national monument of the highest grade.
3. The beaches close to the village are largely unspoilt and the Indian Ocean alongside is frequently relatively warm and calm. Immediately to the south of the village one finds the proclaimed De Mond nature reserve and the De Hoop nature reserve lies immediately to the north.
4. The village is not far from Cape Town and has in recent years become a popular tourist destination. The small hotel adjacent to the fishing harbour was considerably expanded in the 1980's and was further expanded by the addition of a third floor in 2007. There are also two campsites in the village, one of which is operated by the municipality.
5. Some of the residents at Arniston live and work there permanently, while others have second homes in the village which are mainly occupied during

weekends and holidays.

6. According to Ms Beverly Crouts-Knipe, the Provincial Manager of the South African Heritage Resources Agency ('the Heritage Agency'), the village is an extremely significant living heritage resource and is of historical, aesthetic, social, spiritual and scientific value. She described the cultural landscape of Waenhuiskrans as *'the only example of a largely self-sufficient South African coastal fishing community that exhibits the original fishermen's way of life and interaction with the environment'*.
7. The village has considerable tourism potential because of its unspoilt and rather quaint character. The tourism potential offers employment to the resident community and calls for a measure of expansion of business opportunities. The fishing industry has become increasingly regulated and constrained in the face of declining fish stocks, so that the creation of new employment opportunities ought to be fostered and facilitated. The tension between the preservation of the village's character and the development of fresh business opportunities eventually culminated in a rather bitter and, at times, acrimonious battle which came before this Court.

#### The Parties

8. The first applicant is the Waenhuiskrans Arniston Ratepayers Association ('the ratepayers association'), a voluntary association which was formed for the

purpose, inter alia, of devoting itself *'to the enhancement and preservation of the untouched and unique character and natural beauty'* of the town. The chairman of the ratepayers is Mr Colin Bird ('Bird') and he has conducted the litigation on its behalf.

9. The second applicant, the Waenhuiskrans Action Group ('the action group') is also a voluntary association which was formed with the object of, *inter alia*, *'promoting the lawful development and lawful local administration of the Waenhuiskrans area.'* It was formed during the course of the litigation herein and obtained leave from this Court to intervene in these proceedings on 24 December 2008. It was represented in the proceedings by Mr Gregory Swiel ('Swiel'), one of the members of its committee.
10. The ratepayers association and the action group were legally represented in this Court by Mr Jeremy Muller SC, assisted by Mr Robert Patrick, acting on instructions of John Taylor Attorneys.
11. The first respondent, Verreweide Eiendomsontwikkeling (Edms) Bpk ('Verreweide'), is the current registered owner of Erf 599 Waenhuiskrans and seeks to develop the property with a view to establishing a business centre comprising inter alia, shops, holiday apartments and basement parking. It was represented by Mr Robert Ivan Haarburger ('Haarburger'), a director and one of the shareholders of the company. Mr Sean Rosenberg SC acting on instructions of Francis Thompson & Aspden, appeared on its behalf.

12. The second respondent is the Cape Agulhas Municipality. It was established as a municipality on 22 September 2000 in terms of the Local Government: Municipal Structures Act, No 117 of 1998 ('the MSA') and is the successor in title to the Municipality of Bredasdorp which had been established in terms of Proclamation 132/1994 dated 30 September 1994. It was represented by Mr Reynold Stevens ('Stevens'), the municipal manager who was appointed as such in terms of section 82 of the MSA. For the sake of convenience, I shall refer to the local authority at Arniston/Waenhuiskrans simply as the municipality, irrespective of whether the reference is to the Municipality of Bredasdorp or the second respondent. Mr Ashley Binns-Ward SC, acting on instructions of Kritzingers Inc, appeared for the municipality.
  
13. Third respondent is the Registrar of Deeds ('the Registrar'), the official who is tasked with the administration of the deeds office in the Western Cape Province. The Registrar was cited in the proceedings because the relief sought in the application entails that the records in the deeds office be amended. The registrar did not play any active part in the proceedings.

#### Bird's Authorisation

14. Verreweide submitted that Bird was not properly authorised to represent the ratepayers association. Allegations were made that the extract from the minutes which have been proffered in this regard are of dubious provenance

and that there is no evidence to show that he had been properly authorised to represent the ratepayers association in these proceedings.

15. Mr Peter Edward Hofmeyr ('Hofmeyr'), a member of the Executive Committee of the ratepayers association has deposed to an affidavit dealing with Bird's authorisation. He has expressly stated that *'the meeting resolved that legal action should be instituted regarding the development on erf 599 and in this regard my cryptic note states that there was "almost unanimous approval to legal route". The resolution was not ... merely to investigate the situation, but was that Mr Bird and the necessary legal representatives were to investigate the situation and if they deemed it necessary to proceed with legal proceedings against the developers of erf 599 and the Cape Agulhas Municipality.'*
16. In the circumstances, I accept that Bird was properly authorised to represent the ratepayers.

#### Historical Background to the Dispute

17. The municipality was the owner of land described as Erf 214 Arniston, which was zoned single residential, as well as a public street, Dunkirk Street, which adjoined Erf 214. In September 1999 the municipality published notice of its intention to close a portion of Dunkirk Street, to subdivide Erf 214, to consolidate the subdivided portion of Erf 214 with the closed portion of

Dunkirk Street, to rezone the consolidated erf from single residential and transport zone (as the closed portion of Dunkirk Street had been zoned) to business zone and to alienate the rezoned erf. The consolidated erf in due course became Erf 599 and, for the sake of convenience, I shall refer to it as such throughout.

18. Erf 599 is located in the centre of the village, adjacent the main road that enters the village. It is opposite one of the camp sites and is situate close to the original village cemetery which contains many old graves. There appears to be a narrow strip of land which separates Erf 599 from the erf on which the cemetery is situate, but some graves actually lie on the border of Erf 599.
19. Publication of the aforesaid notice elicited a number of objections on a wide range of grounds including, *inter alia*, that residents of Dunkirk Street would suffer inconvenience; that business premises would have a negative impact on the value of the adjoining residential premises; that the proposed development had not been considered in the context of the development of Arniston as a whole and was not viable; that the proposed development would cause an increase in noise levels; and that the development would lead to an increase in foot- and vehicular traffic. No objection to the disposal of the property was, however, taken on the grounds that it was required for the provision of municipal services.
20. Two of the members of the ratepayers association, both architects, Messrs

AS Rudolph ('Rudolph') and AJ Loudon ('Loudon'), through KMH Argitekto, also submitted objections to the proposed development. If the development was to be proceeded with, however, they proposed that the municipality make the rezoning subject to certain conditions. Their proposal in this regard read as follows:

*'The rezoning of the consolidated erf from Single Residential and Transport Zone to Business Zone is not acceptable without any zoning conditions protecting the interests of surrounding owners. The following conditions must be imposed in terms of section 42(1) of the Land Use Planning Ordinance 15 of 1985:*

- (1) No vehicle or pedestrian access to be allowed off Dunkirk Street to the proposed development.*
- (2) A two metre high masonry wall, painted white, to be constructed along the entire north boundary (Dunkirk Street) of the proposed site.*
- (3) A two-storey height restriction be imposed which is in keeping with the character of Arniston.*
- (4) A 4.5 metre setback from the boundary on Dunkirk Street, which reflects the setbacks allowed for surrounding residential properties.*
- (5) A 4.5 metre setback from the boundary line adjacent the cemetery site, in order to respect the nature and character of the cemetery.*
- (6) Zoning uses to be restricted to Shops, Restaurant, and petrol station with residential above ground floor.*
- (7) Specific exclusions to be block of flats, hotel and any liquor store or off sales outlet.*
- (8) A parking requirement of 6 bays per 100m<sup>2</sup> must be imposed for all retail and restaurant components. This ratio is in keeping with the provincial requirements. Parking for any residential buildings must be 1 bay for every dwelling unit with additional 2 bays for every 10 units designated for visitors parking.*
- (9) Refuse room to be located on an accessible position in Du Preez Street.*
- (10) The existing fish cleaning facilities to be relocated and reinstated at the developers cost in an agreed position.*
- (11) Building plan approval to be subject to the approval of the Arniston Ratepayers Association's Aesthetic Committee.*

21. The KMH conditions were expressly referred to in the agenda for the public meeting of the municipality's council ('the Council') which was scheduled to take place on 25 January 2000 and the agenda contained, inter alia, the

following recommendation there anent:

'AANBEVEEL

*Dat die Raad die voorgestelde ontwikkeling van erf 214 Waenhuiskrans goedkeur onderhewig aan die volgende voorwaardes:*

- (1) Dat 'n uitnodiging vir ontwikkelingsvoorstelle / tender in die pers geadverteer word.*
- (2) Dat die Publieke Werke Komitee en genomineerde lede van die Waenhuiskrans/Arniston Belastingbetalersvereniging 'n Ontwikkelingskomitee vorm wat bogenoemde tenders oorweeg en 'n aanbeveling aan die Raad maak vir goedkeuring.*
- (3) Dat die voorgestelde ontwikkelingsvoorwaardes van KMH Argitekte, soos bo genoem, as goedkeuringsvoorwaardes gestel word en met die ontwikkeling tot uitvoering gebring word, tensy dit deur laasgenoemde komitee met beoordeling van die ontwikkelingsvoorstelle, ter syde gestel word, waarop die betrokke beswaarmakers hul reg tot appèl kan uitoefen.'*

22. At the meeting held on 25 January 2000, which was open to the public, the Council decided to approve the proposed development in accordance with the aforesaid recommendation and passed resolution 14/2000. An extract from the minutes of the meeting reveals that the resolution followed the recommendation made in the aforesaid agenda, virtually to the letter. The only substantive change which was made, was that condition 4 in the KMH proposal was eliminated, thereby reducing the overall number of conditions to 10.
23. Resolution 14/2000 having been passed and Erf 599 having been created by the subdivision of Erf 214, the municipality called for development proposals by placing advertisements in the local press on 14 December 2001. Only one proposal, dated 5 October 2002, was received - from the Arniston Bed & Breakfast & Coffee Shop Consortium. The aforesaid consortium

subsequently replaced it with an amended proposal dated 5 November 2002.

24. On 13 December 2002 the municipality once again advertised for development proposals. Pursuant to this advertisement, two proposals were received - one from the Arniston Bed & Breakfast & Coffee Shop consortium and another from Messrs Allan Smith, Hannes van Zyl and Ron Kirby. The Council considered both of these proposals on 17 February 2003, but decided to accept neither '*aangesien daar verskeie aangeleenthede is waaroor die voornemende ontwikkelaars nie genoeg duidelikheid in hul voorleggings verskaf het nie, en die Raad derhalwe nie 'n ingeligte besluit kon neem nie*'. Instead, the Council decided to advertise again.

25. The third advertisement, on 7 March 2003, elicited three proposals - one from each of the two previous contenders and a third from Dream Fisheries. The proposal submitted by Smith, Van Zyl and Kirby on this occasion amended the one previously made. The proposal by the Arniston Bed & Breakfast & Coffee Shop Consortium, however, was identical to that which had been submitted in November 2002, though it was accompanied by a letter which elaborated on the previous proposal. Under the heading 'PROPOSED OWNERSHIP', the letter set out the following:

- *This tender is submitted on behalf of messrs C Swanepoel and E Botha or nominee.*
- *The nominee will be a legal entity to be created for the specific purpose of owning the development (hereinafter called :- ARNISTON BAY CONSORTIUM / ABC).*

- *The founder shareholder/members will be C Swanepoel and E Botha and will include other partners in the development team, financiers and may include members of the community should it be to the benefit of ABC and should ABC need the expertise of such partners on board.*
- *The project will be managed by a professional development team ...'*

22. The aforementioned proposals were considered at a meeting of the municipality's Council on 15 April 2003. The minutes of the meeting reveals that the following decision was taken:

'BESLUIT 121/2003

- \_\_\_\_\_ (i) *Dat die Raad die ontwikkelingsvoorstel van Arniston Bed & Breakfast in beginsel aanvaar onderhewig aan die volgende voorwaardes:*
- (1) *Alle wetlike prosedures nagekom word;*
  - (2) *'n Grondbeskikbaarheidsooreenkoms met die ontwikkelaar aangegaan word;*
  - (3) *Daar 'n ooreenkoms met die ontwikkelaar aangegaan word waarin die detail van die ontwikkeling omskryf sal word.*
- (ii) *Dat die konsep ooreenkomste waarna hierbo verwys word na die Dagbestuur verwys word vir goedkeuring.'*

23. Of the three proposals which were considered at the Council's meeting on 15 April 2003, only that by Arniston Bed & Breakfast & Coffee Shop consortium mentioned a purchase price for the property - R426,000.00. In terms of the proposal by Dream Fisheries, it would not acquire the land, but would merely develop it. The proposal by Smith, Harman and Van Zyl, indicated that they wished to negotiate a price for the land. (Their earlier proposal in response to the previous advertisement had referred to a purchase price of '*nie minder nie as R500 000 vir die eiendom*').

24. Pursuant to the decision taken in terms of resolution 121/2003, the

municipality on 25 April 2003 advertised its intention to sell Erf 599 to the Arniston Bay Consortium. In terms of the advertisement, objections were due by 26 May 2003.

25. On 26 May 2003 the Arniston Waenhuiskrans Conservation Association ('the conservation association'), a voluntary association, which was at the time also represented by Bird, requested that the deadline for objections be extended, due to difficulties which it alleged it had experienced in obtaining relevant information from the municipality.
26. In response to the advertisement of the proposed sale, a total of 21 objections were submitted to the municipality, as well as a petition signed by 18 persons who supported Harman. These objections, as well as the petition, were considered by the municipality's Mayoral Committee at a meeting held on 26 June 2003. The minutes of the meeting reveal that 9 of the objectors referred to the price at which the property was to be sold. The objections in this regard included, inter alia, '*prys nie realisties vir besigheidsesoneerde erf nie; ... Die prys is vir die eiendom is nie markgerig nie; ... Die prys vir die eiendom is te laag en nie markverwant nie; Die prys van R426 000,00 is ver onder markwaarde vir erf.*'
27. Although the advertisement related to the sale of Erf 599 and not to the development thereof, objections were also made to the style of the proposed development. These included, inter alia, the following: '*Argitektoniese*

*voorstelle vir nuwe sentrum is onaanvaarbaar en neem nie Arniston styl in ag nie; ... Die voorgestelde ontwikkeling is totaal buite die karakter van Arniston en nie nodig nie. Dit sal die ingang na en eerste indrukke van Arniston ernstig beïnvloed; ... Die Raad is te haastig om 'n belangrike besluit te neem wat bepalend is vir die toekomstige karakter van die dorp.'*

28. The minutes of the Mayoral Committee meeting, under the heading 'KOMMENTAAR' includes reference, inter alia, to the fact that the proposed architectural style of the proposed centre was *'in lyn met die Arniston styl en sal sodanige gebou die standaard stel aan alle toekomstige ontwikkeling te Waenhuiskrans/Arniston'*. The comments also included reference to the fact that no departures from the town planning scheme regulations would be permitted in the absence of compliance with the Land Use Planning Ordinance, 15 of 1985 ('LUPO'). The Mayoral Committee, in terms of resolution 15/2003 resolved to adhere to the decision that the development proposals of the Arniston Bay Consortium be accepted *'aangesien dit die beste pakket is wat die Raad ontvang het'*.
29. The conservation association subsequently made further objections to the sale of Erf 599 both through its representative, Bird, and through attorneys Mallinicks. Reference was, inter alia, made to the proposed sale price, it being alleged that the municipality had not obtained an independent valuation of the property and that the property immediately adjacent to Erf 599, which was less than half the size of Erf 599, was on the market for R1,1 million.

30. By letter dated 3 October 2003 the municipality's attorneys, Luttig and Son, gave a written undertaking on its behalf that it would not proceed to transfer erf 599 without notifying the conservation association of its intention to do so.
31. On 18 December 2003 the Council met to consider and discuss the further objections made by and on behalf of the conservation association. In terms of resolution 251/2003 which was adopted at that meeting, the Council confirmed, inter alia, that the principles of fairness, reasonableness and openness had been followed, that the process around the proposed sale had been correctly conducted and that the sale to the Arniston Bay Consortium would go ahead. Its then Municipal Manager Mr Keith Jordaan ('Jordaan') was empowered and authorised to sign the Deed of Sale.
32. On 24 February 2004 the municipality, represented by Jordaan, concluded a written Deed of Sale with Arniston Bay Consortium, represented by Mr Pieter Christiaan Swanepoel ('Swanepoel'), in terms whereof Erf 599 was sold to the said consortium for R426,000.00 plus VAT. The Deed of Sale contained, inter alia, the following relevant provisions:
- '6. *Die eiendom is tans gesoneer vir besigheidsdoeleindes. Die Verkoper gee geen waarborge of ondernemings dat die sonering gewysig of verander sal word om die Koper in staat te stel om uitvoering te gee aan enige voorstelle wat reeds deur die Koper aan die Verkoper voorgelê is nie. Alle ontwikkelings wat die Koper op die eiendom beoog, moet op die normale wyse aan die Verkoper voorgelê word en sal slegs oorweeg en goedgekeur word op dieselfde wyse as enige ander aansoek.*

18. *Hierdie koop is onderhewig aan die volgende spesiale voorwaardes:*

18.1 *Die Koper sal so spoedig moontlik na ondertekening hiervan, maar in elk geval binne drie (3) maande planne vir die ontwikkeling van die eiendom by die Verkoper indien vir oorweging.*

18.2 *Indien die Verkoper die planne sou afkeur of wysigings daaraan sou vereis, sal die Koper binne die tydperk wat deur die Verkoper gestel word, nuwe planne voorlê vir die ontwikkeling van die eiendom, of die gewysigde planne voorlê.*

18.3 *Sodra daar aan al die vereistes wat die Verkoper mag stel met die goedkeuring van die ontwikkelingsplan voldoen is, sal die Koper onmiddellik 'n aanvang neem met die oprigting van die geboue op die eiendom. Die Verkoper sal geregtig wees om vir die begin en afhandeling van elke aksie 'n tydskedule aan die Koper voor te lê en die Koper sal verplig wees om daaraan te voldoen.*

18.4 ...

18.5 *Transport van die eiendom sal slegs aan die Koper gegee word teen 'n sertifikaat van die Verkoper of enige persoon of instansie deur hom aangewys, wat bevestig dat die Koper aan al die vereistes van die ontwikkeling voldoen het.'*

33. On 1 July 2004 the Municipal Finance Management Act, 56 of 2003 ('the MFMA'), came into operation.

34. On 6 October 2004 a tripartite agreement ('the tripartite agreement') was concluded between the municipality (referred to as the seller), Arniston Bay Consortium (described as the first purchaser ) represented by Swanepoel and Verreweide (which was described as the second purchaser), also represented by Swanepoel.

35. The preamble of the tripartite agreement referred to the Deed of Sale dated 24 February 2004, whereafter it stated, inter alia, that:

'EN NADEMAAL

*dit nie duidelik is wie die koper is nie en die verkoper in elk geval versoek is om die koop te kanselleer en 'n nuwe koop te sluit met die tweede Koper.*

NOU DAAROM

*kom die partye soos volg ooreen:*

- (1) Die koop tussen die Verkoper en die eerste Koper word hiermee gekanselleer.*
- (2) Die tweede Koper koop hiermee van die Verkoper die eiendom soos hierbo beskryf op presies dieselfde voorwaardes en terme as waarop die eerste Koper dit van die Verkoper verkoop (sic) het en soos uiteengesit in die aangehegte koopbrief.*
- (3) ...*
- (4) ...*
- (5) Die tweede Koper sal gebonde wees en gebonde bly aan die bepalings van die aangehegte koopbrief en Pieter Christiaan Swanepoel in sy hoedanigheid as verteenwoordiger van die tweede Koper verbind homself hiermee as borg en mede hoofskuldenaar in solidum met die tweede Koper teenoor die Verkoper vir die nakoming van die tweede Koper van al die verpligtinge in terme van hierdie ooreenkoms.'*

36. During the first half of 2006 a dispute arose between the municipality and Verreweide regarding the time when the municipality was obliged to pass transfer of Erf 599 to Verreweide. The dispute was referred to arbitration. In the event, the municipality and Verreweide settled their disputes and concluded a written settlement agreement. In clause 1.3 of that agreement Verreweide consented to a condition being included in the title deed to the effect that ownership of Erf 599 would revert to the municipality in the event that Verreweide failed to bring the development to practical completion, in accordance with the plans which had already been submitted to the municipality, by 31 December 2008. In clause 1.9 of the settlement

agreement, reference was made to the fact that Verreweide intended to apply for the rezoning of the property, as well as for certain departures and consent to an altered use of Erf 599.

37. On 25 January 2007 transfer of ownership in Erf 599 to Verreweide was registered in the Deeds Office in terms of Title Deed 4257/2007.

38. Shortly after registration of transfer as aforesaid, Haarburcher, or an entity associated with him, concluded a sale with Verreweide in respect of Erf 599 at a price of R5 million.

39. On 27 March 2007 and 21 June 2007 the municipality was advised by two sets of lawyers that Verreweide could not alienate Erf 599 by reason of its development obligations. The sale was accordingly not implemented, but Haarburcher and his fellow investors subsequently simply purchased the shares in Verreweide - at a price of R4,8 million.

40. On 7 August 2007 Haarburcher addressed an e-mail to the municipality in the following terms:

*'(w)e are in the process of buying all the shares in Verreweide Eiendomsontwikkeling (Edms) Bpk. In terms of the Building Regulations are there any provisions prohibiting Verreweide Eiendomsontwikkeling from submitting new building plans that comply with the Zoning regulations, Development proposals and the Arniston Town Planning Scheme?'*

41. Haarburcher met with the Council in September 2007 and Verreweide

submitted revised plans to the municipality for its approval on 2 October 2007. These plans departed substantially from the original design and provided, inter alia, for basement parking.

42. At some time in November 2007, before the these revised plans were approved, Verreweide started excavations on Erf 599. The Council met on 27 November 2007 in order to consider, inter alia, the new shareholding in Verreweide and the revised plans which had been submitted. The municipality's Community Services Committee recommended to the Council that legal opinion be obtained as to whether or not the development ought to be proceeded with and recommended that *'n hof interdik uitgereik word aan die huidige aandeelhouer, aangesien die bouplanne nog nie goedgekeur is nie en daar alreeds begin is met uitgrawings.'* Jordaan, however, recommended that the Council agree to the submission of new plans, provided that such plans were not in conflict with the development proposals which had been contractually agreed upon with Verreweide, the applicable scheme regulations, the zoning of Erf 599 and other applicable legislation and regulations. The Council adopted Jordaan's recommendation as resolution 274/2007.

43. The excavations on Erf 599 alerted the ratepayers to the fact that the development of Erf 599 would be proceeding and a decision was taken to obtain legal advice. On 4 December 2007 attorneys Mallinicks addressed a letter to the municipality and Verreweide/Haarburger setting out the concerns

of the ratepayers association and the action group in regard to the alienation of Erf 599, the ostensible failure of the municipality to comply with the provisions of section 14 of the MFMA and the unauthorised construction work or excavations on Erf 599. The letter, which was forwarded by facsimile, called for, inter alia, information regarding the manner in which Verreweide was substituted as the purchaser for the Arniston Bay Consortium and the approved plans in respect of Erf 599. The letter also warned of possible urgent interdict proceedings in order to halt the development work at Erf 599. The municipality's response to this letter, albeit dated 18 December 2007, was only received in January 2008. The municipality declined to provide a copy of the plans, inasmuch as Verreweide was the owner thereof. The letter was terse and failed to deal with the concerns raised by the ratepayers association. It made no reference to resolution 14/2000 or to the KMH conditions referred to therein, which were to govern the development of Erf 599.

44. On 7 December 2007 the municipality's building committee evaluated the revised plans submitted by Verreweide. On 10 December 2007 the municipality's building inspector, P K Siebrits ('Siebrits') notified Verreweide of certain problems which had arisen in regard to the revised plans which had been submitted. These included, inter alia, that the 4.5m building line on Dunkirk Street and at the adjacent cemetery was relevant to the basement level; that the Council's decision in terms whereof building plans had to be submitted to the ratepayers association's aesthetics committee had to

complied with (Siebrits indicated that his department would so submit the plans); and that the certificate provided by the land surveyor was insufficient to determine whether the proposed basement was in fact a basement as specified in the Scheme regulations.

45. On 12 December 2007 Haarburger met with the municipality's building committee. The following day, a Mr J Marthinus ('Marthinus') addressed a letter to Haarburger listing 7 items that required attention before '*any consideration can be given to finally evaluate your building plans*'. These 7 items included those referred to in the immediately preceding paragraph to which Siebrits had drawn attention.
46. On 16 December 2007 Haarburger sent a rather forceful letter to Marthinus. He took issue with the matters raised by Marthinus in regard to the building plans and, *inter alia*, called for '*written legal opinion*' in support of the municipality's view that the basement level was relevant to the 4.5m building line adjacent to the cemetery. In the letter, Haarburger pertinently enquired '*what can we build on the cemetery boundary?*'.
47. On 19 December 2007 the municipality addressed a letter to Verreweide advising that its building committee had rejected the revised building plan application regarding Erf 599 Arniston. Two reasons for this decision were advanced in the letter. The first of these was that the basement level did not comply with the definition of a basement in the Zoning Scheme Regulations.

The second reason which was provided, was that the proposed building did not comply with rezoning conditions '*as well as the tender condition regarding the 4.5 m building line in Dunkirk Street and on the cemetery side*'. In the letter, Verreweide was '*instructed to cease with all building work on Erf 599, Arniston, until these matters have been resolved.*' Verreweide was further advised that it had the right of appeal to the Municipal Manager in terms of the Municipal Systems Act, 32 of 2000 ('the Systems Act'), and its attention was also drawn to section 9 of the National Building Regulations and Building Standards Act, 103 of 1977 ('the Building Act').

48. On 20 December 2007 Verreweide notified the municipality of its appeal to Jordaan in terms of the Systems Act. It did not lodge any appeal to a review board in terms of the Building Act.
  
49. On 18 January 2008 Rudolph and Loudon met with Marthinus and Siebritz. Loudon was formerly a partner in KMH Argitekte. At this meeting they established, *inter alia*, that (a) ten of the conditions which KMH Argitekte had proposed for the rezoning of Erf 599 had in fact been adopted by the Council in resolution 14/2000; (b) the revised plans which Verreweide had submitted had not been approved; (c) the municipality had given notice to Verreweide that it was liable to prosecution for continuing works in the absence of approved plans and (d) the municipality had issued a 'cease-works' order to Verreweide, which the latter had not complied with. They reported back to Bird on 22 January 2008.

50. On 1 February 2008 the ratepayers launched proceedings to interdict the construction work on Erf 599. The application was set down for hearing on 7 February 2008. Verreweide, however, conceded that it could not build without approved plans and on 14 February 2008 an Order was obtained from this Court by agreement in terms whereof Verreweide was obliged to cease construction until such time as it had obtained plan approval. The Order further provided, inter alia, that if the building plans were subsequently approved, the ratepayers association would be given three business days' notice prior to the resumption of construction work on Erf 599.
51. In the mean time, the ratepayers association, having become aware that the municipality had adopted the KMH proposals which provided for input from its aesthetics committee, advised the municipality on 7 February 2008 that its aesthetics committee had not been provided with a copy of the revised plans that Verreweide had submitted. In response, the attorneys for the municipality on 8 February 2008 requested to be informed of the status of the aesthetics committee and called for a copy of the constitution of the ratepayers association.
52. On 12 February 2008 the ratepayers association, through its attorneys, reverted to the municipality's attorneys. The relevant letter stated that the aesthetics committee was '*an ad hoc committee convened by it as and when required*' comprising members of the ratepayers association with qualifications

appropriate to the task at hand and that Messrs Loudon, Rudolph, Jack and Lloyd would sit as members of such committee to consider the plans submitted in respect of Erf 599. A copy of the constitution of the ratepayers association was also provided to the municipality's attorneys.

53. On 18 February 2008, Jordaan published his appeal award. He started from the premise that Erf 599 had been rezoned for business use on 25 January 2000 and upheld the appeal. He found, inter alia, that Verreweide had not breached the conditions of rezoning by failing to obtain the approval of the ratepayers association's aesthetics committee, because such committee did not exist.
54. Verreweide returned to site on Friday 22 February 2008 and recommenced construction. By that time, however, the plans which it had submitted had still not been approved. Consequently, on Monday 25 February 2008, the ratepayers association delivered notice of an application in terms whereof it renewed and supplemented its application for urgent interdictory relief. The ratepayers association's papers were served on the attorneys for Verreweide and the municipality on the afternoon of 25 February 2008. In those papers, the ratepayers association for the first time raised the issue that the rezoning of Erf 599 appeared to have lapsed in January 2002. The ratepayers association sought leave to set the renewed application down for hearing on 27 February 2008. It was, however, subsequently agreed that Verreweide would file its answering affidavits by 29 February 2008 and that the matter

would be set down for hearing on 5 March 2008.

55. On 29 February 2008, Jordaan gave notice of a Special Council Meeting (In Committee) to be held at 09h30 that same day. The purpose for which the meeting was convened, according to the notice, was *'(t)o consider the application from Verreweide Eiendomsontwikkelings (Edms) Bpk for the extension (sic) of rezoning as business: erf 599 Waenhuiskrans/Arniston.'* The notice set out the background to the application and drew attention to the fact that in terms of section 16(2)(a) of LUPO, a rezoning lapses if the rezoned land is not used for the rezoned purpose within two years, unless the council (if authorised to do so by the applicable structure plan) extends the period of validity. The notice continued *'(i)t appears that while the land was in municipal ownership the rezoning was not extended. The reason for that is not clear, but it is likely that the need to extend was simply overlooked. There are building plans for the development of erf 599 that have been submitted by the owner, Verreweide ... which cannot be granted if the zoning of the land is not in accordance with the intended business use.'*
56. The Council duly met on 29 February 2008. The minutes of this meeting reveal that the Council passed resolution 57/2008 *'(t)o extend the rezoning of erf 599 Waenhuiskrans/Arniston as Business, for a further period of two years.'*
57. Verreweide duly filed its papers at approximately 15h30 on the afternoon of

29 February 2008, after having obtained written advice from its senior counsel to the effect that the municipality could 'revive' a zoning that had lapsed after the period of two years referred to in section 16 of LUPO had run its course. Copies of the agenda and minutes of the aforesaid Council meeting on 29 February 2008 were attached to Haarburger's answering affidavit. Haarburger also attached a copy of a letter by Jordaan, dated 29 February 2008, which informed Verreweide that the business zoning of Erf 599 had been extended, that its revised plans had been approved and that these were ready for collection. In fact, however, the plans were only approved on 3 March 2008 and certain conditions were attached to such approval. When Jordaan became aware that the date when the plans were approved was reflected as being 3 March 2008, he instructed Marthinus to backdate the approval to 29 February 2008. The ratepayers association was not notified of the conditions which were attached to the approval of the revised plans and only became aware thereof during the course of the proceedings in this Court.

58. The hearing of the ratepayers association's renewed application for an interdict was set down for 4 March 2008. On that day, the Heritage Agency sought leave to intervene. As a result, the ratepayers association's application was postponed for hearing on 9 April 2008.

59. On 11 March 2008 the municipality's building inspectors inspected the construction work, on Erf 599. They found that there were material deviations from the approved building plans. So, for example, there were portions of the

basement floor which had been constructed at a level in excess of that reflected on the plans (approximately 27,1m instead of 26.55m). Marthinus prepared a letter which was addressed to Verreweide, dated 14 March 2008, setting out, inter alia, the details of the unauthorised work. The letter also served to inform Verreweide that building work on the site had to cease until the deviations had been rectified or until Verreweide had succeeded in obtaining a departure from the building regulations from the Council, failing which legal action would be instituted. The letter was forwarded to Jordaan by e-mail and was apparently never sent to Verreweide. Instead, it was annotated '*nie vir uitstuur nie*'.

60. On 18 March 2008 Verreweide launched another appeal to Jordaan in terms of section 62 of the Systems Act, against certain of the conditions which had been imposed at the time when the revised plans were approved. (Two of these conditions had underpinned the aforesaid letter which Marthinus had prepared on 14 March 2008.) The ratepayers association was not notified of the aforesaid appeal. At the same time, Verreweide applied to further amend the revised plans by raising the finished floor level of the basement from 26.55m as shown on the plan, to 27,36m.
61. The municipality took advice from its attorneys in regard to the further appeal noted by Verreweide. By letter dated 15 April 2008 the attorneys advised that if the basement were to be constructed at a level of 27,36m, it would no longer constitute a basement. Instead, it would become a storey and a

departure would not enable Verreweide to deviate from the two-storey height limit which was in place. The advice given by the attorneys also included suggestions as to how the municipality could assist Verreweide in rendering its construction on erf 599 lawful. These suggestions included, inter alia, that the requirement dealing with the approval by the ratepayers association's aesthetics committee be suspended and/or deleted and that '*the municipality may ... wish to consider the possibility of a waiver or alteration of the conditions of rezoning or some of them*'. The relevant letter also set out how the rezoning conditions might be amended in order to overcome the problem that Verreweide's construction work did not comply with the approved plans or rezoning conditions.

62. The renewed interdict application and the intervention application by the Heritage Agency was ultimately heard by Louw, J on 9 April 2008. On 22 April 2008 Louw J handed down judgment interdicting further construction on erf 599 pending the final determination of these review proceedings.
  
63. On 23 May 2008 the municipality notified the ratepayers association that it had received an application by Verreweide to amend the rezoning conditions. Marthinus had reservations about the application and communicated these to Jordaan by e-mail. Marthinus pointed out, inter alia, that the application contained insufficient detail and/or information and that it could accordingly not be properly considered. It was also not possible to make a recommendation, to deal with objections, or to explain the rationale behind the

proposed rezoning. In the event, the ratepayers association and 117 other parties objected to the proposed rezoning.

64. On 9 September 2008 a special meeting of the Council was convened. At such meeting, the Council adopted a resolution in terms whereof certain of the rezoning conditions which had been imposed on 25 January 2000 were amended. The amendments included, inter alia, the following:

64.1 the increase of the two-storey height restriction to a three-storey height restriction;

64.2 the 4.5m setback from the boundary line adjacent the cemetery would not apply to the boundary walls or to the basement (which had in fact been constructed to a level well above ground on the boundary adjacent the cemetery);

64.3 whereas a block of flats, hotel, liquor store or off sales outlet on erf 599 had been prohibited, the only exclusion which remained, was a block of flats;

64.4 the approval by the aesthetics committee of the ratepayers association was eliminated and replaced with a requirement that *'(n)o building plans may be submitted to the Municipality for approval unless the aesthetics of the structures depicted in those plans have been*

*approved by a committee of councillors established ad hoc for that purpose, and in considering such aesthetics the committee shall have regard not only to the advice of municipal officials but also to the submissions of Waenhuiskrans/Amiston Ratepayers Association and the comments thereon of the landowner.'*

65. The aforesaid amendment of the rezoning conditions is the subject of a pending appeal by the ratepayers association to the provincial administration.

RELIEF SOUGHT

66. The ratepayers association and the action group were represented by the same attorneys and counsel. The action group made common cause with the ratepayers and, for the sake of convenience, any reference herein below to the arguments advanced by the ratepayers, must be deemed to include the action group. The ratepayers has sought to review and set aside:

66.1 the transfer of Erf 599 from the municipality to Verreweide on 25 January 2007;

66.2 the appeal decision of Jordaan on 18 February 2008;

66.3 the decision of the municipality made on 29 February 2008 to extend the rezoning of Erf 599 as business;

- 66.4 the purported approval by the municipality on 29 February 2008 of the building plans of Verreweide in respect of its construction upon Erf 599.
67. Verreweide has opposed the granting of relief sought in each of the four instances referred to above. The municipality has opposed the relief sought in 66.1 and 66.3 above and abides the decision of the Court in regard to the remainder of the issues.

The Transfer of Erf 599

68. The ratepayers association has advanced the following grounds for the review of the transfer of erf 599:
- 68.1 the provisions of section 14 of the MFMA came into operation on 1 July 2004 and inasmuch as transfer of erf 599 only occurred on 25 January 2007, the municipality had been obliged to comply with those statutory provisions, but it has not done so;
- 68.2 Jordaan had no authority to conclude the tripartite agreement entered into on 6 October 2004 in terms whereof Verreweide purchased erf 599 and any transfer which occurred pursuant to such sale could accordingly not be allowed to stand;

- 68.3 the municipality had failed to establish a development committee in order to evaluate development proposals in respect of erf 599, as was required in terms of resolution 14/2000 dated 25 January 2000. Resolution 14/2000 constitutes a mandatory or material procedure or condition which was a prerequisite to the valid sale and transfer of erf 599 and in the absence of compliance therewith, the transfer could not have been validly effected.
69. Verreweide and the municipality have opposed the review of the transfer aforesaid on the grounds that:
- 69.1 review relief is discretionary in nature, the ratepayers association has failed to institute the proceedings for review within a reasonable time and, in the exercise of its discretion this Court ought to decline to review the said transfer as a consequence of the delay;
- 69.2 the transaction which underpins the transfer of erf 599 was concluded before the MFMA came into operation, the MFMA does not apply retroactively and, on a proper construction of section 14(2) it would accordingly not apply to the transfer in question;
- 69.3 alternatively and in the event that section 14(2) is found to apply to the transfer of ownership in erf 599, the process followed by the

municipality has resulted in effective compliance with the section

Delay

70. The so-called 'delay-rule' evolved prior to the enactment of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA'), because there had been no statutorily prescribed time limit for the institution of review proceedings. In deciding whether or not to exercise its power of review, a court exercises a discretion. In the exercise of such discretion it may, in terms of the delay-rule, withhold relief if there has been an undue and unreasonable delay in the institution of the proceedings, despite the fact that good grounds for review exist. The rule acknowledged the public interest in the finality of administrative decisions and the fact that interested parties might suffer prejudice if they had arranged their affairs in accordance with a particular administrative act which, albeit invalid, had remained unchallenged for an extended period of time. (See *Oudekraal Estates (Pty) Ltd v The City of Cape Town & Others*, [2009] ZASCA 85, para [33] - hereinafter referred to as *Oudekraal 2*).
71. The approach which must be adopted when a court is called upon to consider whether or not a litigant has failed to institute proceedings for review timeously, was set out in *Wolgroeiërs Afslaers v Munisipaliteit van Kaapstad 1978 (1) SA 13 (AD) at 39C-D* (and confirmed in *Oudekraal 2* at para [50]):

*'Word beweer dat die aansoekdoener nie binne redelike tyd die saak by die Hof aanhangig gemaak het nie moet die Hof beslis (a) of the verrigtinge wel na verloop van 'n redelike tydperk eers ingestel is en (b) indien wel, of die onredelike vertraging oor die hoof gesien behoort te word. Weereens, soos dit my voorkom, met betrekking tot (b) oefen die Hof 'n regterlike diskresie uit met inagneming van al die relevante omstandighede.'*

72. The first part of the enquiry, whether or not an unreasonable delay has occurred, does not involve the exercise of any discretion. It entails an analysis of the underlying relevant facts and the making of a value judgment as to whether or not, on the basis of such facts, the delay has been reasonable or unreasonable. (See *Oudekraal 2, para [51]*). If it is found that the delay was unreasonable, the Court has a broad discretion to decide whether or not the delay ought to be disregarded (see *Oudekraal 2, para [57]*).
73. As a basic point of departure, the making of a decision by an organ of State or public body which is beyond the power conferred upon it, constitutes an invalid act which falls to be set aside (see *Chairperson SDC & Others v JFE Sapela Electronics (Pty) Ltd & Others 2008 (2) SA 638 (SCA) at 644C-E*). If a court were to non-suit an applicant for review purely on account of unreasonable delay, an otherwise invalid administrative act would clearly be clothed with legality. It is in the interests of justice that a Court should be slow to exercise its discretion in a manner which undermines the principle of legality. As was said in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) at para [56]* (and approved in *Oudekraal 2 at para [81]*):

*'... a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law.'*

In short, *'finality is a good thing, but justice is better'* (see para [80] of *Oudekraal 2*, citing Lord Akin in *Ras Bihari Lal and Others v The King Emperor [1933] All ER 723 (PC)* with approval)

74. The court must, however, consider whether or not there are circumstances present which militate against the setting aside of the invalid administrative decision so that it must be permitted to stand. So, for example, the respondent or third parties may be prejudiced, or it might be impractical or impossible to undo what has been done. In such circumstances, the court may exercise its discretion in favour of allowing the invalid decision to stand. (See *Chairperson STC v JFE Sapela Electronics 2008 (2) SA 638 (SCA)* at 649-650).
75. Section 7(1)(b) of PAJA provides that proceedings for judicial review must be instituted *'without unreasonable delay and not later than 180 days after the date ... (b) ... on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'* Section 9 of PAJA provides that:

- '(1) The period of-*  
*(a) ...*  
*(b) ... 180 days referred to in sections 5 and 7 may be extended for a fixed period,*  
*by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.*  
*(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.'*

76. As is evident from the foregoing, the first enquiry is whether or not it can be said, on the facts of this case, that the ratepayers association delayed in the institution of these proceedings.
77. The application herein was launched on 1 February 2008. In terms of section 7(1)(b) of PAJA, the ratepayers association would have to satisfy the Court that it had been informed, or had become aware, or might reasonably have been expected to have become aware of the administrative action complained of within the preceding period of 6 months, i.e. at some stage after 1 July 2007. If it is unable to do so, this Court may extend the 180 day period on application by the ratepayers, if it is in the interests of justice to do so.
78. As appears from the historical background to the matter, there was substantial activity around the development of erf 599 during the period 1999, when the municipality first decided to embark upon such a course, to 24 February 2004 when the Deed of Sale was signed with the Arniston Bay Consortium. During that time Bird represented the conservation association. As such, he had been involved in the process surrounding the alienation of erf 599 and he was in fact the person who signed the conservation associations' objections. In October 2003, the municipality's attorneys, on its behalf, gave a written

undertaking to Mallinicks, the attorneys acting for the conservation association, that it would not proceed to transfer erf 599 without first giving notice of its intention to do so.

79. Bird subsequently became chairman and representative of the ratepayers association and Mallinicks also came to act as the attorneys for the ratepayers association. Indeed, when Mallinicks wrote the letter to the municipality in December 2007 warning of possible interdict proceedings, it was acting on behalf of both the ratepayers and the conservation association. Both Bird and Mallinicks would accordingly have been aware of the preceding events.
80. It is clear on the papers that as far as the ratepayers were concerned, nothing much happened in relation to erf 599 after conclusion of the aforesaid Deed of Sale. The ratepayers association addressed letters to the municipality enquiring about the status of the sale of Erf 599 and developments in regard to the property on a more or less annual basis. Some of these letters appear to have been simply ignored and those that were responded to, did not offer much information.
81. Bird has expressly stated that the ratepayers association knew that in terms of the Deed of Sale which had been entered into between the municipality and the Arniston Bay Consortium on 24 February 2004, the consortium would have to build before it could take transfer of the land. According to Bird, the

ratepayers association did not know that the tripartite agreement had been concluded, nor did it have knowledge of the transfer of Erf 599 into the name of Verreweide in January 2007. Bird's evidence in this regard is uncontested. Bird has stated that it was only when construction commenced around November 2007 that the ratepayers association made further investigations and approached attorneys Mallinicks to assist. Mallinicks wrote the letter dated 4 December 2007 to the municipality and the latter's reply was received in January 2008. The municipality's reply, according to its letter, was accompanied by the documentation called for in Mallinicks' letter. Bird has stated that the information contained in the founding affidavit came to his knowledge when the municipality's aforesaid reply was received. The current proceedings were instituted shortly thereafter.

82. During the course argument, Mr Rosenberg contended, inter alia, that the ratepayers association ought to have acted at an earlier stage, once it was clear that the process around the development around Erf 599 had run its course. That date, according to his argument, was when the sale agreement of 24 February 2004 had been concluded. Although the agreement provided that transfer would only be effected after building work had been completed, he contended that it was *prima facie* unreasonable to delay a challenge to the disposal process until such time as transfer of the property had taken place.
83. Mr Rosenberg's argument loses sight of the fact that the municipality's attorneys had given a clear and unequivocal written undertaking on their

client's behalf that transfer would not be effected without notice to the conservation association. Bird had knowledge of that undertaking and, through him, so did the ratepayers association. It appears to be common cause that no such notice was given.

84. Mr Rosenberg also contended that the ratepayers association, had it been reasonably diligent, could and would have made regular enquiries to ascertain whether or not transfer of the property had been effected, but that it did not do so.
  
85. A period of more than 3 years elapsed between the conclusion of the Deed of Sale on 24 April 2004 and the commencement of excavations on Erf 599 at around November 2007. At the time when the development of Erf 599 was on the forefront in Arniston, one would certainly expect that a reasonably diligent party who is genuinely concerned about the development, would make enquiries from the municipality to ascertain the current state of affairs. The same does not hold true once such an extended period of time has lapsed without any visible sign or outward manifestation that the development of the property would be proceeding. On the contrary, it would, in my view, be reasonable to assume that the development which had originally been envisaged had come to naught, especially in circumstances where enquiries which were made, were not even responded to. Neither the municipality nor Verreweide have alleged that they took any steps to keep the ratepayers association apprised of developments in regard to Erf 599. Absent a

response to the enquiries made with the municipality, it is not clear how the information about Verreweide's substitution for the original purchaser, the transfer of erf 599, or the lodging of revised building plans, would or could have reasonably come to the notice of the ratepayers association.

86. Given the municipality's failure to respond to the ratepayers association's queries I am satisfied that the ratepayers could not reasonably have become aware, prior to the commencement of construction work, that the development of Erf 599 was set to continue. Inasmuch as the ratepayers association was under the impression that construction work had to be complete before transfer of ownership in the property could be effected, as was provided for in the Deed of Sale entered into in 2004, there was no cause for it to anticipate or to suspect that transfer would take place earlier. Once it was alerted to the fact that the proposed development was set to become a reality, it acted with despatch and brought its application within the time stipulated by section 7 of PAJA.

87. In any event, it appears to me that this is a case where the interests of justice require that the parties be heard and that their dispute be determined by this Court. The case is undoubtedly an important one. From Verreweide's point of view, it has made a substantial financial investment in the venture. Seen from the municipality's perspective, it is responsible for managing the town of Waenhuiskrans/Arniston for the benefit of all of its residents. As such, it has an obligation to create employment- and development opportunities, as well

as to protect the environment for the benefit of present and future generations as is envisaged in section 24 of the Constitution. The ratepayers association and the action group have a clear interest in preserving the beauty and unspoilt character of this unique coastal village which is one of the gems along the Cape South coast. A further factor which cannot, in my view, be overlooked, is the ostensible collusion between Jordaan and Verreweide/ Haarburger.

88. Jordaan, in his capacity as the municipal manager, was a public official who was entrusted with a public duty. As such, he was obliged to act in good faith and to deal with matters that came before him without fear or favour. It appears from the historical background to the dispute which has been set out above that Jordaan, however, failed to act impartially and objectively. So, for example, no evidence has been placed on record to show that he was authorised by the Council to enter into the tripartite agreement in terms whereof Verreweide became the purchaser and developer of erf 599; he hastily convened a special meeting of the council on 29 February 2008 to 'extend' the rezoning of erf 599 once it came to his notice that the rezoning was alleged to have lapsed and he instructed officials of the municipality to backdate the approval of Verreweide's revised building plans, to mention but a few examples. In these circumstances justice, in my view, requires that the actions of the municipality be scrutinised by the Court in order to give effect to section 33 of the Constitution.

Section 14 of the MFMA

89. As has been alluded to above, the MFMA came into operation on 1 July 2004. The ratepayers have alleged that the municipality had been obliged to comply with section 14 of the MFMA. This basis for this contention is that the tripartite agreement which was concluded on 6 October 2004 was a separate agreement, concluded after the MFMA came into operation. Alternatively, if the tripartite agreement was not a separate agreement, the contention is that the transfer of ownership in erf 599 occurred after the statute came into operation.
90. Verreweide and the municipality have contended that the MFMA is not applicable to the transaction involving Erf 599. The argument underpinning the latter contention, in a nutshell, is that the transaction underpinning the eventual registration of transfer of Erf 599 in the Deeds Office had been completed prior to the MFMA coming into operation, when the Deed of Sale was signed on 24 February 2004 and the tripartite agreement which was concluded on 6 October 2004 merely clarified who the purchaser of the property was. On this construction, the provisions of the MFMA would not find application, because ordinarily, a statute does not have retroactive effect in the sense of taking away or impairing vested rights acquired in terms of previously existing laws, unless it expressly states that it does, or if it is clear on a proper interpretation of the statutory provision that the Legislature intended it to so apply. (See *Transnet Ltd v Chairman National Transport*

*Commission 1999 (4) SA 1 (SCA) at 7A-D).*

91. The first issue which falls to be determined is accordingly whether or not the tripartite agreement was a separate agreement, or whether it was part and parcel of the original transaction.
  
92. Mr Binns-Ward contended that the development proposal which had been made by the Arniston Bed & Breakfast and Coffee Shop, which culminated in the Deed of Sale, had to be read together with the explanatory letter dated 31 March 2003. The letter stated that the tender was submitted '*on behalf of messrs C Swanepoel and E Botha or nominee*', and that the nominee '*will be a legal entity to be created for the specific purpose of owning the development (hereinafter called :- ARNISTON BAY CONSORTIUM / ABC)*'.
  
93. On behalf of Verreweide and the municipality, it was contended that it was clear that Swanepoel at all times intended to purchase the property on behalf of a nominee. The intention had been to change the name of Verreweide to Arniston Bay Consortium, but it was not possible to do so. The municipality's attorney, Mr P C Luttig ('Luttig'), was of the opinion that registration in favour of a purchaser as described in the Deed of Sale would be refused by the deeds office. The tripartite agreement was accordingly prepared so as to clarify the identity of the purchaser.
  
94. In an affidavit deposed to by Luttig he stated that it was never intended '*that*

*the sale to Arniston Bay Consortium would be cancelled in the sense that the second respondent (i.e. the municipality) would thereafter be free to alienate erf 599 independently of Mr Swanepoel. The cancellation and simultaneous second sale agreement were merely intended to clarify the identity of the buyer if the buyer had been first respondent (i.e. Verreweide) using “Arniston Bay Consortium” as a trading name, or to transfer the rights and obligations of the buyer to first respondent to the extent that they may legally have been different entities.’*

95. Where parties have decided to embody their agreement in a written document, or in instances where a contract is by law required to be in writing, the document itself becomes the sole memorial of the terms of the transaction which it was intended to record. In the absence of a claim for rectification, extrinsic evidence as to the terms of the agreement, or as to what the parties had intended, is irrelevant and inadmissible. A contract for the sale of land is required by law to be in writing and accordingly all the material terms of the agreement must be reduced to writing. The identity of each of the parties is a material term of the contract and unless it is ascertainable from the written document, the contract is invalid. The parties may be incorporated by reference, but if a contract describes a party in such a way that he cannot be identified without oral evidence of what was actually agreed, the contract is void. (See *CHRISTIE: ‘The Law of Contract in South Africa, 5 ed, p 121-122; ZEFFERT & PAIZES: ‘The South African Law of Evidence, 2 ed, 346-7 & 363; Industrial Development Corporation of SA (Pty) Ltd v Silver 2003 (1) SA 365*

(SCA) at 369-70).

96. The primary rules of construction require that words in contracts must be given their ordinary meaning in the context of the contract as a whole. When regard is had to the Deed of Sale which was concluded on 24 February 2004, the seller is described as '*Munisipaliteit Kaap Agulhas*' and the purchaser as '**ARNISTON BAY CONSORTIUM** hierin verteenwoordig deur **PIETER CHRISTIAAN SWANEPOEL** in sy hoedanigheid as **Direkteur van Arniston Bay Consortium.**' The Deed of Sale contains a total of 19 separate clauses dealing with the terms on which the sale was effected. None of these clauses qualify the description of the purchaser in any way. Clause 17 of the Deed of Sale provides that: '*Hierdie kontrak bevat die hele kontrak tussen die partye en geen wysiging daarvan is bindend op die partye nie tensy dit skriftelik is en onderteken is deur alle betrokkenes.*'
97. The description of the purchaser in the Deed of Sale is, in my view, unambiguous. The contract clearly and expressly states that the purchaser is Arniston Bay Consortium. There is no reference in the agreement to the purchaser acting on behalf of a nominee, to Swanepoel being the purchaser on behalf of a nominee, or to Verreweide. Whatever Swanepoel's intention might have been when he made the development proposals, became irrelevant when the contract was concluded, particularly in view of clause 17 aforesaid.

98. As has been alluded to above, the tripartite agreement describes Arniston Bay Consortium, represented by Swanepoel in his capacity as a director, as the first purchaser. Verreweide is described as the second purchaser. The preamble to the agreement refers to the Deed of Sale (koopbrief) concluded on 24 February 2004 and that *'dit nie duidelik is wie die koper is nie en die verkoper in elk geval versoek is om die koop te kanselleer en 'n nuwe koop te sluit met die tweede Koper.'* The agreement then expressly provides in clause 1 thereof that *'Die koop tussen die Verkoper en die eerste Koper word hiermee gekanselleer.'* (Emphasis added) Clause 2 of the agreement states *'Die tweede Koper koop hiermee van die Verkoper die eiendom soos hierbo beskryf op presies dieselfde voorwaardes en terme as waarop die eerste Koper dit van die Verkoper verkoop (sic) het en soos uiteengesit in die aangehegte koopbrief.'* It must also be noted that the tripartite agreement included a new provision which had not been incorporated in the Deed of Sale, namely that Swanepoel bound himself as surety and co-principal debtor with Verreweide for the performance of the latter's obligations.
99. The plain meaning of the words used in the tripartite agreement is that the sale to the Arniston Bay Consortium was cancelled and that a fresh agreement was concluded with Verreweide, a different entity. There is nothing ambiguous about the wording of the relevant clauses, or about the contract as a whole. The original sale was cancelled and a fresh sale, albeit at the same price and substantially on the same terms, was concluded with Verreweide.

100. There is no claim for rectification of the aforesaid Deed of Sale or of the tripartite agreement, nor is there any allegation on the papers that either or both of these contracts failed to reflect the intention of the parties thereto correctly. Extraneous evidence as to the meaning and import of the words used in these contracts, or of the intention of the parties at the time, is accordingly not admissible in terms of the parol evidence rule (see *KPMG v Securefin Ltd 2009 (4) SA 399 (SCA) at 409F-410I*). In these circumstances, the evidence by Luttig, as to what he had been told by, or on behalf of Swanepoel, in regard to the identity of the purchaser and what the parties intended in regard to the cancellation of the Deed of Sale concluded with the Arniston Bay Consortium, is irrelevant and inadmissible.
101. The sale to Verreweide which was effected in terms of the tripartite agreement, is a separate and distinct contract that was concluded on 6 October 2004. In terms of that contract, erf 599 was sold to a different purchaser, who acquired rights in terms of the tripartite agreement and not from the Deed of Sale which had been concluded at an earlier date. The tripartite agreement was concluded after the MFMA came into operation, which means that the provisions of the MFMA were applicable to it. In view of this finding, it is not necessary to deal with the arguments advanced in regard to the retrospectivity or otherwise of section 14 of the MFMA.
102. Both Verreweide and the municipality contended that the provisions contained

in section 14 of the MFMA have, in any event, been complied with, inasmuch as the process which the municipality had followed, served to give effect to those requirements.

103. The MFMA, according to its long title, was enacted, inter alia, '*(t)o secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government*'. The relevant portion of section 14 of the MFMA provides as follows:

**'14. Disposal of capital assets**

- (1) *A municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.*
- (2) *A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal council in a meeting open to the public-*
  - (a) *has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and*
  - (b) *has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.*
- (3) *...*
- (4) *...*
- (5) *Any transfer of ownership of a capital asset in terms of subsection (2) ... must be fair, equitable, transparent, competitive and consistent with the supply chain management policy which the municipality must have and maintain in terms of section 111.*
- (6) *...'*

104. It appeared to be common cause between the parties that erf 599 had not been needed to provide the minimum level of basic municipal services and that subsection 14(1) was accordingly not applicable.

105. In terms of subsection 14(2), a municipality is constrained, before it may transfer a capital asset, to do at least three things: firstly, it must hold a

meeting of its Council which is open to the public; secondly, at such meeting the Council must decide, on reasonable grounds, that the asset is not required to provide the minimum level of municipal services; and thirdly, at the said meeting, the Council must consider the fair market value of the asset, as well as the economic and community value which will be received in exchange for the asset. Section 14(5) imposes the additional requirement that the process which the municipality adopts in transferring a capital asset must be fair, equitable, transparent and competitive and consistent with the supply chain management policy referred to in section 111 of the MFMA (Inasmuch as section 111 of the MFMA only came into operation 1 December 2004, the reference to the supply chain management policy would clearly not apply to the instant case).

106. Verreweide and the municipality contended that the requirements of section 14 of the MFMA had been complied with inasmuch as the municipality had followed an extended public process which culminated in the sale of the property. During the course of such process the municipality advertised its intention to develop the property on no less than 3 occasions. The only proposals received were those of the Arniston Bed & Breakfast & Coffee Shop, Smith Van Zyl & Kirby and Dream Fisheries. The best price that could be obtained was R426,000.00 (plus VAT), which is indicative of the fact that this was its market value. The municipality eventually decided to sell the land to Arniston Bay Consortium, advertised its intention to do so and considered the objections which were received. Verreweide was then substituted for the

Arniston Bay Consortium so as to reflect the correct details of the purchaser.

107. It must, of course, be borne in mind that the municipality had been obliged, in terms of section 124(2) of the Municipal Ordinance, No 20 of 1974, to advertise its intention to alienate erf 599 and to consider the objections, if any, that were lodged pursuant to such advertisement. On 25 April 2003 the municipality indeed published its intention to sell erf 599 to the Arniston Bay Consortium at a price of R426,000.00. No similar advertisement was published in respect of the sale to Verreweide. A period of approximately 18 months had passed from the time the aforesaid advertisement of the proposed sale to the Arniston Bay Consortium had been published, to the time when the municipality sold erf 599 to Verreweide in October 2004. Life, even in a small town in the rural areas, is not static. Circumstances change and market prices vary. Affected residents of Waenhuiskrans/Arniston had no opportunity to object against the proposed sale to Verreweide.
108. In *African Christian Democratic Party v Electoral Commission 2006 (3) SA 305 (CC)* one of the issues confronting the Constitutional Court was whether or not there had been compliance with the provisions of the Municipal Electoral Act, 27 of 2000. O'Regan J in dealing with this issue, referred to the reasoning of Van Winsen AJA in *Maharaj and Others v Rampersad 1964 (4) SA 638 (A) at 646C* where it was stated:

*'The enquiry, I suggest, is not so much whether there has been "exact", "adequate", or "substantial compliance" with this injunction but rather whether*

*there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance.*

109. O Regan J proceeded to find (at 317B-C) that the question thus formulated is *'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose.'* In this regard, it was pointed out that a narrowly textual and legalistic approach was to be avoided in favour of a common sense approach. One has to ask whether the steps taken by the local authority were effective in achieving compliance with the statute.
110. In support of the contention that the objectives of section 14 had, in any event, been met in regard to the transfer of ownership in erf 599 to Verreweide, Mr Rosenberg relied on the process which culminated in the conclusion of the Deed of Sale with the Arniston Bay Consortium. He submitted that it was clear on the papers that erf 599 was not needed to provide the minimum level of basic services, inasmuch as no objections were made on that basis. He further submitted that the price of R426,000 clearly constituted the market value of the property at the time, because it was the only firm offer which had been made after three separate advertisements and that the Council had accordingly also fulfilled the requirements of section 14(2)(b) of the MFMA. Moreover, he submitted, the entire process around the sale to the Arniston Bay Consortium was conducted publicly, all of the

objections had been properly considered and the provisions of section 14(5) had also been met. Indeed, so it was argued, the entire process around the alienation of erf 599 had run its public course and in that context it did not matter that Verreweide was not the same entity as the Arniston Bay Consortium.

111. Given the finding that the tripartite agreement constituted a fresh and independent agreement for the sale of erf 599 to Verreweide, it would appear to me that Mr Rosenberg's argument is doomed to fail. However, even if Verreweide was merely a nominee who stepped into the shoes of the Arniston Bay Consortium, it appears to me that Mr Rosenberg's argument can still not succeed, inasmuch as the Council failed to consider the market value of the property.
112. There is no outright allegation in the papers filed by the municipality that it ever considered the fair market value of erf 599. Had it done so, it would have been a simple matter to say that it did. The evidence, however, tends to establish the contrary.
113. The only copies on record of the advertisements which the municipality placed when calling for development proposals, are those dated December 2002. There is, however, no evidence that the advertisements in 2001 and 2003 were differently worded. The English version of the advertisement read as follows:

*'CAPE AGULHAS MUNICIPALITY*

*CALL FOR DEVELOPMENT PROPOSALS:  
DEVELOPMENT OF ERF 599 WAENHUISKRANS/ ARNISTON*

*Cape Agulhas Municipality hereby requests development proposals for erf 599 situated north of Main Road and south of Dunkirk Street, in extent approximately 2 245m<sup>2</sup>, for the development of business purposes.*

*This prime property lends itself for development of the abovementioned, is centrally located and could serve as a focal point in Waenhuiskrans/Arniston.*

*Further details and documentation is (sic) available from Mr E Oosthuizen at telephone number (028) 425 1919 during office hours.*

*Sealed quotations marked "DEVELOPMENT PROPOSAL: ERF 599, WAENHUISKRANS/ARNISTON" placed in the tender box, will be received by the Municipal Manager until 12:00 on Monday 6 January 2002 and will be opened after the closing hour.*

*Council reserves the right not to accept the lowest or any quotation.*

*K JORDAAN  
MUNICIPAL MANAGER  
PO BOX 51  
BREDASDORP*

*13.12.2002'*

114. As is evident from the advertisement, no reference whatsoever was made to the sale of the land, or to any sale price for the land. Indeed, the advertisement gave no indication that the property was to be sold. Rather, it tended to indicate that the municipality would remain the owner and that the successful tenderer would develop it at the municipality's cost - the advertisement expressly stated that the lowest quotation would not necessarily be accepted.
115. In the event, the municipality accepted the lowest tender - for R426,000.00. In 2002 the proposal put forward by Smith Van Zyl and Kirby included a

tender of 'R500,000 minimum'. The evidence is that the municipality was in fact advised by Van Zyl that R500,000.00 was considerably lower than market related value, but that their development proposal was one conceived of as an empowerment project.

116. Many of the objections which the municipality received in response to the advertisement of the proposed sale to Arniston Bay Consortium, were directed at the fact that the proposed sale would be effected at less than market value.
117. The municipality filed a comprehensive answering affidavit dealing with the circumstances surrounding the creation of erf 599, as well as the development and sale thereof. There is, however, no evidence that the municipality knew what the market value of the property was, or that it took any steps to determine its market value. Instead, its current municipal manager, Reynold Stevens ('Stevens') who deposed to the answering affidavit stated '*I respectfully submit that it should be assumed that the council considered the offered price to have indicated the fair market value of the asset. There was certainly no indication (notwithstanding three separate advertisements over a period of well in excess of a year) of any prospective buyer willing to pay more than R426,000 for the land...*' (emphasis added).
118. The latter statement is, of course not strictly correct. As has been referred to above, Van Zyl et al offered a minimum of R500,000.00. Stevens attempts

to get past this fact by stating that such price was not repeated in the second proposal put forward by this group, but his reasoning does not detract from the fact that there is no direct evidence that the municipality or its Council ever considered the market value of Erf 599.

119. Jordaan, who was the municipal manager at the time when the decisions around the development and sale of erf 599 were taken, deposed to an affidavit in the proceedings on 4 March 2008. He obviously had first hand knowledge of the events at the time, but he has also not stated that the Council considered the market value of erf 599.

120. The requirements of section 14(2) were expressly raised in the founding papers. If the municipality had considered the market value, one would have expected reference thereto in the minutes of its meetings or in the affidavits filed on its behalf. Instead, the minutes reveal that the municipality considered the proposal by the Arniston Bay Consortium as the most appropriate '*ongeag die geldelike aanbod vir die perseel*' and the affidavits filed on behalf of the municipality are silent on this aspect. These facts lead to the inescapable conclusion that the municipality failed to give consideration to the market value of erf 599.

121. Having regard to the foregoing facts and circumstances, the argument that there was compliance with the provisions of section 14(2) cannot be sustained. It is clear that the municipality's decision to transfer of erf 599 to

Verreweide fell foul of the provisions of section 14 of the MFMA and, as such, was invalid and falls to be set aside in terms of the provisions of section 7(2)(a)(i) of PAJA as being unauthorised.

122. The further issue which arises as a consequence of the foregoing findings is whether or not this Court should, despite the finding, decline to set aside the transfer of the property due to the lapse of time and the prejudice which Verreweide may suffer. A period of approximately 5 years has elapsed since the conclusion of the tripartite agreement and almost 3 years have elapsed since erf 599 was transferred to Verreweide in the deeds office.
  
123. It is clear from what has been stated above that the ratepayers association is not to blame for the delay which occurred between the conclusion of the Deed of Sale in April 2004 and the eventual registration of transfer of ownership in erf 599 on 25 January 2007. In the absence of replies to their enquiries, the ratepayers had no means of knowing that transfer of the property was in the offing. Indeed, Luttig had given a written undertaking to the conservation association that notice would be given before transfer was effected. Enquiries made by the ratepayers association to the municipality were not responded to. Moreover, until such time as excavations on the property commenced during November 2007 there was no outward manifestation of the municipality's intention to pursue the development of erf 599. When excavations commenced, the ratepayers association acted expeditiously in pursuing its remedies. Indeed, the papers in this application were issued in

February 2008.

124. It was pointed out that Verreweide will undoubtedly be out of pocket if the transfer of the property is set aside. It will obviously be entitled to be reimbursed in respect of the purchase price of R426,000.00, but it has clearly expended monies in performing building work on the site. The shareholders of Verreweide, who paid R4,8 million for their shares on the understanding that Verreweide would be able to proceed with the proposed development, might also suffer financial prejudice.
  
125. As regards the construction costs, Verreweide clearly commenced construction at a time when it knew that its revised plans had not been approved. Verreweide is accordingly the author of its own misfortune in this regard. The shareholders are not parties to the litigation in this court. They are, however, in a very similar situation. If they had acted reasonably and diligently, they would not have embarked upon the development in the absence of compliance with section 14 of the MFMA.
  
126. There appears to be no reason why the entire process envisaged by section 14 cannot be started now, if the municipality is still of the view that erf 599 must be developed. Such construction work as has taken place, may obviously have to be demolished either in whole or in part, but it has not been suggested that it would be impossible or wholly impracticable to do so.

127. It follows from the foregoing that the ratepayers association is entitled to the relief it seeks in relation to the transfer of ownership of erf 599 to Verreweide and that such transfer falls to be set aside.

Jordaan's Appeal Decision

128. As is apparent from the historical background set out above, Verreweide submitted an application to build on erf 599 in accordance with revised plans on 2 October 2007. Marthinus refused the application on 19 December 2007 and advised Haarbarger and/or Verreweide accordingly. The reasons why the application was refused, were said to be (a) that the basement level failed to comply with the definition of a basement in terms of the zoning scheme regulations and (b) because the proposed building contravened the zoning conditions, as well as the tender conditions regarding the 4,5m building line on Dunkirk Street and the cemetery side.
129. When Jordaan dealt with the appeal in terms of section 62 of the Systems Act, he approached the matter on the basis that erf 599 was zoned for business purposes in accordance with the decision of the Council which had been taken on 25 January 2000.
130. The ratepayers association seeks to set aside Jordaan's decision on the basis (a) that his decision was underpinned by an error of law inasmuch as the business zoning of erf 599 had lapsed and (b) that the appeal ought to have

been dealt with in terms of the Building Act and that the Systems Act was not applicable.

131. Section 18 of LUPO provides that a council may rezone land in its area of jurisdiction and that the provisions of sections 16 and 17 shall apply to such rezoning, *mutatis mutandis*. In terms of section 16(2)(a)(i) of LUPO, a rezoning which has been granted shall lapse *'if the land concerned is not, within a period of two years after the date on which the application for rezoning was granted, utilised as permitted in terms of the zoning granted by the rezoning ... unless ... the council extends the said period of two years, which extension may be granted at any stage.'*
  
132. In the instant case, the rezoning of erf 599 from single residential and transport, to business, was effected on 25 January 2000 in terms of resolution 14/2000. It would accordingly have lapsed on 24 January 2002, unless erf 599 had in the interim been utilised in terms of the rezoning which had been granted. LUPO defines *'utilisation'* as follows: *"utilisation", in relation to land, means the use of land for a purpose or the improvement of land, and "utilise" has a corresponding meaning'*. *In casu*, this would mean that erf 599 must have been used for business purposes.
  
133. The municipality is not opposing the relief sought by the ratepayers association in regard to Jordaan's appeal decision. The municipality also appears to have come to the conclusion that the rezoning which had been

effected on 25 January 2000 had lapsed, inasmuch as it purported to extend the rezoning on 29 February 2008. Mr Binns-Ward, however, contended that the original rezoning had not in fact lapsed. The basis for such contention was that LUPO does not require physical use of the property and that the municipality had used erf 599 for business purposes inasmuch as they were engaged in disposing of it for business purposes. Mr Rosenberg, in similar fashion, contended that the municipality had used erf 599 for business purposes by calling for development proposals, by investigating the development of erf 599 and by conducting the procedure around its eventual alienation and development.

134. In my view, the construction proposed by Mr Rosenberg and Mr Binns-Ward, does not comply with the ordinary meaning of the word 'use'. The first of the meanings ascribed to the word 'use' in the New Oxford Dictionary, is to *'take, hold or deploy (something) as a means of accomplishing a purpose or achieving a result; ... she used her key to open the front door'*. The Afrikaans equivalent, 'gebruik' is defined as follows in HAT (4<sup>th</sup> ed) '*ww. Jou van iets bedien, dit besig, tot nut maak, in werking stel: Hy het geleer om sy hande te gebruik. ... Hulle gebruik nou die ou kerk as 'n skool.'*' As appears from the aforesaid definitions, the word 'use' or 'gebruik' clearly means that one physically uses or actually applies something, or that some action is taken.
135. Town-planning legislation was originally introduced in order to create urban environments in which different land uses could be arranged in a manner

which minimised conflict and which promoted harmony. These objectives were achieved by regulating the use to which land may be put in accordance with certain defined use zones (see *JEANNIE VAN WYK: 'Planning Law' p 30*).

136. LUPO is clearly intended to regulate the type of activities which may be lawfully conducted on a particular property. The permissible activities on property zoned 'residential', for example, are wholly different to those which are permitted in terms of a 'business' zoning so that, for example, the operation of a medical surgery in premises zoned residential, is not permitted (see *Stadsraad Vanderbijlpark v Uys 1989 (3) SA 528 (A)*). However firm the owner's intention to use land for a particular purpose may be, one does not use land in the ordinary sense of the word, or for purposes of zoning regulations, if there is not some or other de facto use of it (see for example *Cape Town Municipality v Frerich Holdings 1979 (2) SA 1137 (C)*).

137. Whilst I have not been able to find direct authority on the interpretation of section 16(2) of LUPO, section 14 of LUPO, which also refers to the utilisation of property, has been the subject of interpretation by this Court. In *Hangklip Environmental Action Group v MEC Environmental Affairs 2007 (6) SA 65 (C)* the court found that in determining what a property is used for, the enquiry is a factual one in order to determine the purpose for, and the manner in which, the land was actually being used (*at 72E-F*). The Court further found that if land '*is not being used for any purpose and has not been and is not being*

*improved, or if it is impossible to determine for what purpose it is being used or whether it has been or is being improved'* one cannot make any rational determination as to which of the different available zonings would be applicable (at 74B-E).

138. It follows that the mere intention on the part of the owner to conduct a particular activity on any land, or to use it for any purpose, is incapable of constituting the use thereof for purposes of its zoning. It is only when an intention manifests in some outwardly visible manifestation on the property that one can determine what it is being used for.
139. The municipality, in its papers, has not alleged that it used the property, in the sense that it conducted any activities on the property, for any purpose whatsoever during the period of two years immediately after the rezoning of erf 599 on 25 January 2000 nor were any improvements made during that time. Indeed no use was made of the property for any purpose whatsoever until such time as Verreweide started excavations in November 2007.
140. Mr Rosenberg contended that the provisions of section 18 of LUPO militated against a construction that the rezoning of Erf 599, which had been effected on the initiative of the Council, would lapse in terms of section 16(2). I can find nothing in section 18 of LUPO which supports such a contention. Section 18(2) provides that section 16(2) will not apply to land which is rezoned by a Council '*with a view to the acquisition thereof by the council concerned*'. Non

constat that rezoning of land which is already owned by the Council will not lapse in terms of section 16(2). That is simply not what section 18(2) of LUPO provides.

141. Absent an extension of the rezoning in terms of section 16(2), the rezoning which had been effected in terms of resolution 14/2000 on 25 January 2000 will clearly have lapsed after 24 January 2002, i.e. well before the conclusion of the Deed of Sale in 2004. By the time plans were lodged for the construction of the business complex on Erf 599, the property was accordingly no longer zoned for business use, nor was it so zoned at the time when Jordaan dealt with the appeal lodged by Verreweide in February 2008.
142. A local authority has the power to approve plans in terms of section 7 of the Building Act if it is satisfied that the plans in question comply with the requirements of that Act *'and any other applicable law'*. The plans which had been lodged for the construction of business premises were quite simply incapable of being validly approved, because the plans related to the unauthorised and therefore *prima facie* unlawful use of the property in terms of its zoning. Jordaan's decision that the plans had to be approved, was accordingly clearly based on a fundamental error of law as is envisaged in section 6(2)(d) of PAJA and falls to be set aside for that reason.
143. Given the finding on this aspect, it is not necessary for me to deal with the argument that the appeal to Jordaan in terms of the Systems Act was not

competent, given that the Building Act already provided a remedy.

Extension of the Re-zoning on 29 February 2008

144. As has been alluded to above, section 16(2)(a) of LUPO provides that the rezoning of land shall lapse if it is not used as permitted in terms of the zoning granted within a period of two years '*unless ... the council extends the period of two years, which extension may be granted at any stage*' (emphasis added). In this regard, the municipality and Verreweide contended that the rezoning was validly extended on 29 February 2008. The ratepayers association, however, has contended that as a matter of statutory interpretation a council cannot validly resurrect or extend a rezoning which has lapsed, inasmuch as an extension relates to something which is still in existence. A right that has been extinguished, does not exist.
145. The municipality has contended that the words 'at any stage' in section 16(2) of LUPO would be rendered superfluous if the contention of the ratepayers association were to be upheld. Such an interpretation would, it was submitted, conflict with the ordinary rule of construction that meaning must be given to every word. It is only when it is strictly necessary to do so, for example, because the result would be absurd or nonsensical if effect were given to words as they stand, that it is permissible to adopt a construction which results in words used by the Legislature being disregarded or rendered superfluous. (See, for example, *Commissioner for Inland Revenue v Golden*

*Dumps (Pty) Ltd 1993 (4) SA 110 (A) at 116F-117A).*

146. As a starting point in statutory interpretation, one must endeavour to ascertain the intention of the Legislature from the words used in the enactment. When words are clear and unambiguous, one must place upon them their ordinary, grammatical, construction and give them their ordinary effect (see *Randburg Town Council v Kerksay Investments (Pty) Ltd 1998 (1) SA 98 (SCA) at 107*). This principle has often been referred to as the 'golden rule' of construction. In keeping with the modern constitutional dispensation our courts have, however, recently opted for a more purposive approach. In terms of such approach, the purpose of the enactment must guide the interpretation. In giving effect to such an approach, one should look at the preamble or other express indications in the Act as to the object that has to be achieved. In addition, one should study the various sections wherein the purpose may be found and look at the circumstances leading to the enactment in order to ascertain the type of mischief it was intended to deal with. One then has to draw logical inferences from the context of the enactment (see *Veenendal v Minister of Justice 2000 (1) SA 113 (SCA) at para [21]*).
147. Starting with the ordinary meaning of the words used in section 16(2) of LUPO, the New Oxford Dictionary defines the noun 'lapse', inter alia, as '... *Law the termination of a right or privilege through disuse or failure to follow appropriate procedures*'. The verb 'lapse' is defined, inter alia, as '*verb [no obj] 1 (of a right, privilege or agreement) become invalid because it is not*

*used, claimed or renewed; expire: he let his membership of CND lapse. (of a state or activity) fail to be maintained; come to and end...'*

148. The word 'stage' is defined, inter alia, as '*noun 1 a point, period or step in a process or development: there is no need at this stage to give explicit details*'.
149. When regard is had to the meaning of 'lapse' as aforesaid, the words used in section 16(2) of LUPO would ordinarily mean that the rezoning would come to an end, or would terminate, after the expiry of a period two years, unless the period was extended.
150. The word 'lapse' is also used in other subsections of LUPO. So, for example, section 4(8)(b) provides that '*a structure plan shall lapse at the expiry of a period of 10 years after the approval thereof*' unless the provisions of section 4(8)(a), which require its review every ten years, are complied with; section 14(2)(a) provides that a zoning map will, in certain circumstances, lapse after a period of 21 years; section 14(4)(b) provides that use rights which originated as a consequence of section 14(4)(a) but which had not been exercised at the expiry of period of 5 years, '*shall lapse at such expiry*'; section 14(5) provides that any use rights '*shall lapse if not exercised for an uninterrupted period of two years*'; section 14(8) states that no right to erect one dwelling house on a land unit '*shall lapse*'; section 15(5) provides that departures '*shall lapse*' if not exercised within a period of two years and section 27(2) provides that the granting of an application for the subdivision of land in terms of section 25,

*'shall be deemed to have lapsed'* after expiry of a period of 5 years.

151. The manner in which the word 'lapse' is used in LUPO, indicates that the meaning to be given to 'lapse' is that something terminates, or comes to an end, or is extinguished. Moreover, such a construction is borne out by certain of the other provisions of LUPO. So, for example, section 14(4)(b) provides not only that use rights lapse after expiry of 5 years, but adds *'and thereupon the council concerned shall amend the zoning map concerned accordingly'*; section 15(6) provides that where a departure has lapsed in terms of section 15(5), *'the council concerned may amend the register and zoning map concerned accordingly'*; section 27(2) provides that the diagram or general plan will be amended when a subdivision has lapsed and indeed, section 16(3) provides that where *'... a rezoning has lapsed in terms of subsection (2), the local authority concerned shall as soon as is practicable amend the zoning map concerned and, where applicable, a register in its possession accordingly.'*

152. That is, however, not the end of the matter. One must also determine what meaning is to be given to the words 'at any stage' used in section 16(2). It appears to me that there are two possible interpretations in this regard. One construction is that the Legislature intended to provide that rezoning may be extended at any stage prior to the expiry of the period of two years. The other is that the words 'at any stage' qualify the lapsing provision so that the rezoning would only lapse provisionally or temporarily upon the expiry of the

period of two years and could be revived by the subsequent extension thereof.

153. Not all of the provisions of LUPO referred to above which provide for rights, rules, regulations or plans to lapse after the expiry of a certain period of time, envisage that such time(s) may be extended. So, for example, no provision is made to extend the period of time mentioned in section 4(8)(a) within which a structure plan needs to be reviewed; there is also no provision to extend the periods of time referred to in sections 14(4) or 14(5) after which use rights will lapse. In those instances it would accordingly appear that these periods may not be extended and once the time period in question has passed, the rights previously acquired are to be regarded as terminated or extinguished. Similarly, a structure plan which has not been reviewed will fall away and a new structure plan will have to be prepared in accordance with the provisions of section 4 of LUPO.
154. Section 14(2)(b), however, does provide for an extension of time. It provides that '*an appeal committee shall before the expiry of the period of 21 years ... or any extended period determined by the said appeal committee in terms of this subsection ...*' extend the period.
155. The words 'at any stage' used in section 16(2) appear at first blush to have a wider import and it can be argued that if the Legislature intended the words to mean 'at any stage before expiry of the period of two years', it would have

said so. The clause, however, falls to be construed in the context of the section and of the Ordinance as a whole, bearing in mind the purpose of the Ordinance and the objects that the Legislature wished to achieve.

156. The long title of LUPO states that it is an ordinance '*to regulate land use planning and to provide for matters incidental thereto*'. It proceeds to provide for structure plans, zoning schemes, subdivisions of land and certain other matters.
157. Section 5(1) of LUPO states that the general purpose of a structure plan is to lay down guidelines for the future spatial development of the area to which it relates in such a way as will most effectively promote the order of the area, as well as the general welfare of the community concerned. Section 5(2) provides that a structure plan '*may authorise rezoning in accordance with such structure plan*'. The purpose of the scheme regulations, according to section 9 of LUPO, is to provide control over zoning. The general purpose of a zoning scheme, according to section 11 of LUPO, '*shall be to determine use rights and to provide for control over use rights and over the utilisation of land in the area of jurisdiction of a local authority.*' A local authority is required, in terms of section 12, to keep a register of all departures which have been granted and such register forms part of its zoning scheme.
158. The purpose of the Ordinance, as it appears from the long title and the aforesaid provisions, clearly is to regulate and control the manner in which

land is used so that the welfare of the community is safeguarded and so that development and use of the land occurs in an orderly fashion.

159. The intention of provisions such as those contained in sections 14(4)(b), 15(5) and 16(3) appears to be clear - the zoning map and register must constitute a reliable and up to date record of the zoning and departures attached to the various properties which fall under the jurisdiction of a municipality. The zoning map and register appear to be important documents which require accuracy. Without a reliable and current record, the municipality will, for example, not be able to keep proper track of the zonings and departures granted and will, accordingly, not be able to properly control development in its area in accordance with its structure plan. In the absence of a reliable record, the municipality's own officials, for example those who have to approve building plans, will not know which criteria to apply and disputes may arise between the local authority and third parties as to the zoning of a particular property.
  
160. The provisions contained in section 16(3), appear to me to militate against a construction in terms whereof the words '*at any stage*' were intended to relate to a time after the rezoning had lapsed. The local authority is required to amend the zoning map '*as soon as practicable*' after the rezoning has lapsed. There is no provision that a zoning which has lapsed may remain unchanged for any period of time, whether pending an application for extension of the rezoning or otherwise.

161. More importantly though, if the words '*at any stage*' were to refer to the granting of an extension of the rezoning even after it had lapsed, the provisions of section 17 could simply be bypassed. Section 17 prescribes procedures for rezoning of land, but it does not deal with extensions of rezoning. As has happened in the instant case, an owner could therefore notionally apply for an extension of a rezoning years after it had lapsed and such rezoning could be extended without the public process envisaged by section 17 having been conducted. By the time such extension is applied for, all of the circumstances which prevailed at the time of the original rezoning, may have changed, but the application would not have to be advertised and interested parties would neither be able to object, nor would they have any right to be heard, as is provided by section 17. The legislature could never have intended such a grossly inequitable result.
162. Section 17 of LUPO contains extensive provisions detailing the public nature of the process which must be followed when rezoning is applied for. There is good reason for the process being conducted publicly - section 33 of the Constitution guarantees administrative action which is lawful, reasonable and procedurally fair. In terms of section 195 of the Constitution, public administration is required to be transparent and accountable and services must be provided impartially, fairly, equitably and without bias. Just as is the case with all other legislation, LUPO must be construed in a manner which is in harmony with the Constitution and not in a manner which has the result of

circumventing, avoiding or negating it.

163. When section 16(2) of LUPO is interpreted against the foregoing background, it becomes clear that the words 'at any stage' must necessarily mean at any stage prior to the expiry of the period prescribed in the subsection.
164. It follows that the Council acted outside of its powers when it purported to take the decision on 29 February 2008 to extend the rezoning of erf 599 and that such decision falls to be set aside in terms of section 6(2)(a)(i) of PAJA.

The Approval of the Building Plans on 29 February 2008/3 March 2008

165. A necessary corollary of the immediately preceding finding, is that the purported approval of the revised building plans submitted by Verreweide was unauthorised. Section 7 of the Building Act provides that a local authority may approve plans if it is satisfied that these meet the requirements of the said Act and any other applicable law. The plans which were submitted were not in accordance with the provisions of LUPO inasmuch as these provided for the construction of business premises on erf 599 in circumstances where erf 599 was not zoned for business use. The approval of the plans was accordingly materially influenced by an error of law as is envisaged by section 6(2)(d) of PAJA.

166. The approval of the aforesaid plans accordingly also falls to be reviewed and set aside.
167. As a consequence of the above-mentioned findings, it is not necessary to deal with the remainder of the grounds relied upon to found the application for review.

### Costs

168. Three separate costs orders have to be considered: the costs of the application for the review, the costs of the interdict application which were ordered to stand over for determination in these proceedings and the costs of the intervention application by the action group.
169. There appears to be no reason why the usual rule, that costs follow the result, should not apply in respect of both the review application and the interdict proceedings. It also appears to me that the matters raised in these applications were of sufficient importance and complexity to warrant the employment of two counsel.

### The Intervention of the Action Group

170. The action group launched an application on 15 December 2008 in which it sought leave to intervene as the second applicant in the main application

brought by the ratepayers association. The application was enrolled for hearing on 24 December 2008, but prior to the hearing Verreweide consented to the action group being joined as a second applicant. In terms of that agreement, the costs attendant upon the application were to stand over for determination at the hearing of the main application.

171. Mr Muller sought an order that the action group be awarded the costs of its intervention application on an unopposed basis, inclusive of the costs of two counsel.
172. Mr Rosenberg opposed the order sought by Mr Muller and submitted that the intervention by the action group was premature, that it was not warranted by urgency, that it was a piece of chicanery and that its intervention was superfluous.
173. The intervention of the action group has not been dealt with above and it is accordingly necessary to refer briefly to the facts and circumstances surrounding its joinder as these appear from the papers filed in that application.
174. Louw J handed down his judgment in the interdict application on 22 April 2008. On 16 May 2008, Haarburger presented the ratepayers association with 91 application forms of prospective new members of the association. These application forms were presented under cover of letters which indicated

that Haarburger had sought to convene a meeting of the ratepayers association on 31 May 2008 for purposes of passing a series of resolutions which included, inter alia: a resolution that the executive committee of the ratepayers association resign; that the proceedings which had been instituted in this Court be abandoned; and that Bird and another member of the ratepayers association personally pay the legal costs which Verreweide and the municipality had incurred.

175. At the meeting on 31 May 2008 issues arose around the eligibility for membership of the prospective new members and the resolutions were not finally dealt with. As at November 2008 Haarburger had procured the presentation of 116 new membership applications of which 86 were acknowledged by the ratepayers association as being eligible for membership. Of those 86, some 46 applicants were in the employ of Haarburger or entities associated with him. The remaining 40 applicants were direct family of, or persons associated with, the 46 persons in the employ of Haarburger or entities associated with him.

176. The annual general meeting of the ratepayers was scheduled to take place on 30 December 2008. The ratepayers association feared that Haarburger and the new members whom he had introduced would succeed in passing the proposed resolutions so that the review application and the interdict granted by Louw J would be abandoned. In these circumstances, the action group was formed on 6 December 2008 and it sought leave to intervene as an

applicant in the matter so that it could apply for the same relief as that which had been applied for by the ratepayers association, if the latter abandoned the proceedings.

177. Haarburger deposed to an answering affidavit in the application for joinder, but did not expressly deny any of the aforementioned facts.

178. Against the foregoing background, the allegation that the intervention of the action group was premature, unwarranted, or a piece of chicanery, appears to me to be wholly unwarranted. The joinder application was necessitated by the conduct of Haarburger who was clearly attempting to do away with the opposition to Verreweide's proposed development of erf 599, whether by fair means or foul. In such circumstances there appears to me to be no grounds to deprive the action group of a costs order in its favour.

179. Last but by no means least, the Court is indebted to counsel for the detailed Heads of Argument which were filed and for the oral arguments which were presented over three days. The fact that all of the arguments which were advanced, have not been referred to, does not mean that these were not considered.

**IT IS ACCORDINGLY ORDERED THAT:**

1. The second respondent's decision to transfer ownership of erf 599

Waenhuiskrans/Arniston to first respondent, inclusive of the written agreement entered into between the first and second respondents and the Arniston Bay Consortium on 6 October 2004, which decision was taken without the provisions of section 14 of the Municipal Finance Management Act, No 56 of 2003 having been complied with, is hereby reviewed and set aside.

2. The Registrar of Deeds is hereby directed, empowered and authorised to cancel the Deed of Transfer and Deed of Title under number T4267/2007 dated 25 January 2007, in terms whereof the ownership in the aforesaid Erf 599 Waenhuiskrans/Arniston was transferred from second respondent to first respondent, in terms of the provisions of section 6(1) of the Deeds Registries Act, No 47 of 1937.
3. The decisions taken by the second's respondent's municipal manager on 18 February 2008 in the appeal lodged by the first respondent against the rejection of its building plan application in respect of erf 599 aforesaid, are hereby reviewed and set aside.
4. The second respondent's approval, on 29 February 2008 and/or 3 March 2008, of the building plans submitted by first respondent in respect of erf 599 aforesaid, pursuant to the decision by the second respondent's municipal manager as is referred to in paragraph 3 of this order, is hereby reviewed and set aside.

5. The decision of second respondent taken on 29 February 2008 in terms of resolution 57/2008, to extend the re-zoning of erf 599 which had been effected in terms of Council resolution 14/2000, is hereby reviewed and set aside.
6. First and second respondents shall jointly and severally pay the costs of the first applicant in the application for review, on the scale as between party and party, the one paying, the other to be absolved, such costs to include the costs attendant upon the employment of two counsel.
7. First respondent shall pay the party and party costs of the first applicant in the application for interim relief, which costs stood over for determination in these proceedings in terms of the Order made by Louw J on 22 April 2009, such costs to include the costs attendant upon the employment of two counsel.
8. First respondent shall pay the costs of the second applicant in its application for leave to intervene as an applicant in the proceedings, on the scale as between party and party in an unopposed matter, such costs to include the costs attendant upon the employment of two counsel.

  
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A M DE SWARDT, A J

19 November 2009