**IN THE HIGH COURT OF SOUTH AFRICA**
**(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case No: 1490/04

In the matter between:

**SOUTH AFRICAN MUNICIPAL WORKERS UNION** Applicant

and

**CITY OF CAPE TOWN** First Respondent

**CAPE INTERNATIONAL FRESH PRODUCE TRADING (PTY) LTD** Second Respondent

**INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION** Third Respondent

**MINISTER OF PROVINCIAL AND LOCAL GOVERNMENT** Fourth Respondent

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**JUDGMENT: 31 MAY 2005**

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**VAN ZYL J:**

**INTRODUCTION**

[1] This is an application brought by the South African Municipal Workers Union ("SAMWU"), as applicant, against the City of Cape Town (also referred to as "the Municipality" or "the City Council"), as first respondent. It has joined a company known as Cape International Fresh Produce Trading (Pty) Ltd as second respondent, the Independent Municipal and Allied Trade Union ("IMATU") as third respondent, and the Minister of Provincial and Local Government as fourth respondent. It seeks an order, firstly, to review and set aside the first respondent's decision of 4 February 2004 to dispose of the Epping National Fresh Produce

Market ("the market") and, secondly, to declare the sale thereof on 24 February 2004 to the second respondent null and void. In addition it seeks an interdict preventing the first respondent from taking any further steps to dispose of the Maitland Abattoir ("the abattoir") pending compliance with certain procedural obligations. The first respondent has given an undertaking not to take any such further steps pending the finalisation of the present matter.

[2] The third respondent is a recognised trade union with members employed by the first respondent. It was joined by the applicant because of its possible interest in the outcome of these proceedings It has chosen, however, not to intervene and to abide the decision of this court.

[3] The fourth respondent was joined in his official capacity at the instance of the first respondent. This arose from the applicant's initial reliance on sections 77 and 78 contained in chapter 8 of the *Local Government: Municipal Systems Act* 32 of 2000 ("the Systems Act"). The first respondent thereupon gave notice of its intention to attack the constitutional validity of the said chapter 8 and the fourth respondent, in turn, filed an opposing affidavit in terms of rule 10A of the Supreme Court Rules. Subsequently the applicant abandoned its reliance on the said sections 77 and 78 by accepting that it had received notice and been given adequate opportunity to comment on its right as a trade union representing municipal workers whom it had recruited as members. The constitutional issue has hence fallen away and the parties were agreed that the fourth respondent should no longer participate in the proceedings and that no costs order be made in this regard. Mr I Jamie SC, assisted by Ms S J Cowen, confirmed this on behalf of the fourth respondent at the commencement of the matter before us, after which they duly withdrew.

[4] Although a large number of issues were originally canvassed in the voluminous papers (running into close on three thousand pages) filed in this matter, they have been substantially reduced by various concessions appearing from the papers and in counsel's heads of argument. The applicant's primary complaint would appear to be that the first respondent's decision to sell the market and the abattoir constituted an attempt to privatise the municipal services provided by the first respondent through these institutions. Such decision was of a political and socio-economic nature and, although it fell within the purview of the first respondent's powers of local governance, the applicant attacked the manner in which it had been taken.

[5] Mr M Brassey SC and Mr R Paschke appeared for the applicant while Mr L A Rose-Innes SC, Mr C S Kahanovitz and Mr P B J Farlam appeared on behalf of the first respondent. Mr W R E Duminy SC and Mr I C Bremridge represented the second respondent. The court expresses its appreciation to them for their comprehensive heads of argument and helpful submissions made on behalf of their respective clients.

**BACKGROUND**

[6] Since 1994 the face of local government in the Western Cape has undergone significant changes. One of these was the creation, on 5 December 2000, of the City of Cape Town as a unified city ("Unicity") serving as an umbrella municipality in terms of section 12 of the *Local Government: Municipal Structures Act* 117 of 1998 ("the Structures Act"). This was done by amalgamating the seven existing municipalities of Blouberg, Cape Metropolitan Council, City of Cape Town, City of Tygerberg, Helderberg, Oostenberg and South Peninsula. In its new and wide-ranging capacity, the first respondent, as the City of Cape Town, required substantial restructuring and reorganisation so as to harmonise and rationalise the various functions performed and services rendered by its erstwhile municipal components.

[7] The envisaged transitional restructuring process in fact commenced even before the creation of the first respondent. An important aspect of such process was directed at service delivery and institutional change. As early as February 1999 the auditing firm, PriceWaterhouseCoopers, and Gobodo Incorporated produced a report entitled "Strategic Review of the Service Delivery in the Cape Metropolitan Area". According to this report there was no legislative authority requiring a municipality to manage or operate a market or abattoir. Such services constituted purely commercial activities rather than core or basic local government services, which a municipality is obliged to provide to residents within its borders. The report hence recommended the corporatisation or outright sale of the market and abattoir.

[8] In this regard a Unicity Commission ("the Commission") was established on 25 November 1999 by provincial notice 400 of 1999 published in a Provincial Gazette Extraordinary in terms of section 14(5) of the Structures Act. Section 9(8) of such Gazette gave the Commission the power and duty to:

… represent the Councils (as employers) in consultations and negotiations with employees of the Council and their trade unions in regard to employment-related matters affecting such employees relating to the transition to the Unicity, it being recorded that the Councils all have consented to the Commission fulfilling this function.

[9] The Commission's mandate included conducting extensive negotiations with organised labour with a view to facilitating the transitional process required

for the formation of a unified city. In doing so it had unfettered authority to conclude agreements on employment-related matters with the trade unions, being the applicant and third respondent (referred to collectively as "the Unions"). The applicant, however, refused to enter into negotiations with the Commission on the basis that it was not an employer body and hence could not negotiate with the Unions.

[10] In a letter to the applicant dated 11 July 2000, the chairperson of the Commission stated that it was evident "that SAMWU refuses to bargain with the Unicity Commission on any basis whatsoever". This view was strengthened by the applicant's creation, during July 2000, of a non-governmental organisation (NGO) called the Cape Town Anti-Privatisation Forum. Its aim was "to fight the privatisation initiatives of the Unicity and to ensure that Cape Town's municipal service remains in the hands of local government". In a supporting pamphlet the applicant accepted that the public participation and consultation process was important, but it went on to describe such process as "nothing but a farce to trick the public in the Cape Metropolitan Area".

[11] On 15 August 2000 the Commission held a public meeting for residents in Khayelitsha. At the meeting a representative of the applicant expressed the view that the proposed restructuring of services constituted privatisation that could prejudice its members employed by the Cape Metropolitan Council. He then indicated that the applicant would furnish the Commission with written submissions. No such submissions were forthcoming.

[12] On 9 November 2000 the Commission recommended that activities and functions which the Council has no "constitutional or legislative obligation to ensure", or which "do not support its strategic priorities or core functions, should be phased out". This included non-core activities such as the services hitherto afforded by the market and the abattoir.

[13] The phasing out of these services, which would necessarily involve the redeployment or retrenchment of the approximately 160 municipal workers who were members of the applicant or third respondent, required that they be consulted as collective bargaining representatives of such municipal workers recruited by them. For this purpose a restructuring working group ("RWG") was established under the auspices of the South African local government bargaining council ("the bargaining council") as a forum for negotiations between the first respondent and the Unions concerning the restructuring required by the municipal amalgamation process.

[14] On 1 February 2002 the first respondent, as employer, concluded an agreement with the Unions entitled the Agreement on a Micro-Design Process ("the process agreement"). It was a collective agreement directed at regulating micro-design organisational structures below the level of a directorate.

[15] Shortly afterwards the applicant alleged that the first respondent had, without consulting it or giving notice to the local community, appointed a

consultant on 12 October 2001 to assess possible restructuring options for the future operation of the market and abattoir, and to identify the most beneficial solutions. This would appear to be a reference to Organisation Development Africa ("ODA"), which was mandated to conduct a thorough investigation and to furnish a report setting out an assessment of the options for the future of the market and abattoir. Various meticulously researched reports running into more than 1000 pages emanated from this investigation.

[16] This gave rise to a rumour that the first respondent was on the verge of selling the market and abattoir. When the Unions raised this at a meeting of the RWG on 10 April 2002, they were informed that the first respondent was in the process of scrutinising two reports drafted by consultants in this regard. They were given the assurance that the fate of the market and abattoir would be negotiated in terms of the process agreement.

[17] At a meeting of the first respondent's executive committee on 7 May 2002, a report bearing the title "Assessment of Options for the Determination of the Future of the Epping National Fresh Produce Market" was presented for consideration. The report pointed out that the market was experiencing static growth and its sustainability was under pressure. Without significant adjustments to its current business model it would not be able to generate sufficient income by 2004 to service its operational requirements. It was hence recommended that the business operations of the market be sold and that the land and buildings be leased on a long-term basis. This would bring in the amount of some R16 million as the purchase price of the business and would simultaneously divest the first respondent of a burdensome operation. The lease would generate an income of some R6 million per year, subject to an agreed annual escalation. Needless to say the executive committee resolved, on 7 May 2002, to accept the said recommendation, subject to consultation with the affected staff and the Unions on the adoption of the resolution in accordance with the applicable legal process.

[18] In a letter dated 8 May 2002 from the applicant to the first respondent, Mr André Adams, the applicant's provincial secretary, accused the first respondent in strident terms of acting in bad faith by deciding to sell the market and abattoir. He described it as "clearly the worst case of bad faith bargaining by the City" and suggested that the Unions had been misled by the first respondent's delegation into believing that there was no truth in the rumour that the first respondent intended selling the market and abattoir. On the contrary, they had been led to believe that consultants were in the process of drafting reports which would "be fed into the micro-design process".

[19] This complaint gave rise to a meeting between the applicant and the first respondent on 13 May 2002. It resulted in an agreement, facilitated by the Commission for Conciliation, Mediation and Arbitration ("CCMA"), confirming that the future of the market and abattoir would be dealt with in terms of the micro-design process provided for in the process agreement. A further agreement on the micro-design process was concluded on 26 August 2002 with a view to ensuring the continued applicability of the process agreement by revising the dates set down for the various stages of the process, the final date being set at 14 November 2002.

[20] On 27 September 2002 the first respondent forwarded its proposed micro-organisational structure to the Unions. The market and abattoir were omitted from

the structure because the proposal was to dispose of them. During October 2002 the proposal was withdrawn subsequent to the transfer of political power from the Democratic Alliance to the African National Congress / New National Party ("ANC/NNP") coalition. This was followed by a progress report, submitted on 6 November 2002 to the executive committee, recommending that the "disposal of the Market and Abattoir be expedited within the framework of the Staff Placement and Migration Process". In addition the executive committee should oversee all aspects of the disposal process while ensuring that the City Council's interests be "secured by way of a transparent process".

[21] The executive committee approved these recommendations subject to such qualification. At its meeting on 11 December 2002 the City Council accepted these recommendations on the basis that the said functionaries would oversee the process while other aspects would be referred back to the executive committee to be dealt with within its delegated authority (described as its "delegations"). The Mayor subsequently indicated her approval of the City Council's qualified acceptance of the aforesaid recommendations.

[22] In a letter dated 23 December 2002, Mr Adams of the applicant once again called the first respondent's good faith into question in regard to the management of municipal abattoirs. He also suggested corruption in the tender process. The acting city manager, Mr David Daniels, vigorously denied this in his response dated 24 December 2002 and invited the applicant to place the matter on the agenda of the next RWG meeting.

[23] In subsequent letters to the applicant and third respondent, both dated 28 January 2003, Mr Daniels called upon the Unions to furnish their views on the proposed disposal of the market and abattoir. According to Mr Daniels discussions on the future of these services had already been held with "affected employees". The first respondent, however, fully intended "to hear and consider" the views of the Unions in this regard "either within the broader consultation process or as a separate item in the RWG". Attached to the letters were "reports which form the basis of the City's proposal to dispose of the Market and Abattoir as well as resolutions taken to date". Any further information, which would enable the Unions to prepare for the discussion at the next meeting of the RWG, would be "gladly provided". Mr Daniels added that the first respondent had "deemed it necessary to appoint transaction advisors to make the necessary preparations for the proposed disposal of the said services, subject to the process of bona fide engagement as referred to above". He urged the Unions to respond with all haste so that "formal negotiations" could commence immediately within the RWG with a view to concluding an agreement as envisaged by section 197(2) and (6) of the *Labour Relations Act* 66 of 1995 ("the LRA").

[24] At the RWG meeting of 19 February 2003, Councillor Thee on behalf of the City Council made it clear that the first respondent had appreciation for the concerns of the Unions regarding the market and abattoir. He assured them that no final decision had been taken in this regard, and that no such decision would be taken "before all options had been fully explored", including "consultation with the Unions".

[25] During March 2003 it was reported in the media that Councillor Mowzer, the executive councillor for trading services, had announced the first respondent's decision to sell the market and the abattoir. When the applicant brought this to its

attention, it gave the assurance that Councillor Mowzer had spoken without a mandate and that no such decision had as yet been made. There had, however, been a decision in principle to do so, as was stated at the bargaining council meeting of 20 March 2003. At this meeting the first respondent endeavoured to motivate the decision on the basis that running the market and abattoir was not consistent with the first respondent's service delivery mandate. It remained open to persuasion, however, that its decision in principle might be incorrect, in which regard it was "more than willing to hear submissions from the Trade Unions as to alternatives to disposal in whatever format and in whichever forum the Trade Unions wish". In the meantime, pending a final decision to dispose of the market and abattoir, it invited the Unions to negotiate an agreement with it in terms of section 197(6) of the LRA regarding the placement of employees performing services at these undertakings. Such agreement should be negotiated and concluded during April 2003.

[26] At a meeting of the RWG on 22 April 2003 the first respondent sought the consent of the Unions, in terms of clause 3.8 of the process agreement, for the appointment of a task team to deal with the market and abattoir, and other micro-design structures falling within its mandate. The first respondent expressed its commitment to continuing with the micro-design process alongside the placement process. This gave rise, on 7 May 2003, to the Placement Agreement ("the placement agreement") as the culmination of consultations and negotiations, between the first respondent on the one hand and the Unions on the other, directed at placing existing employees of the first respondent into a new organisational structure.

[27] At a meeting of the project committee held on 16 May 2003, it was reported that difficulties were being experienced in bringing the Unions to the table with a view to negotiating a section 197 agreement. The applicant, it was said, appeared to be "stonewalling any attempts at conversation". The failure to reach such an agreement would have the effect that union members who, as employees of the first respondent, would be affected by the sale of the market and abattoir, would be automatically transferred to the purchaser. It was hence proposed that all affected staff be informed of their unions' failure to negotiate. This would place "maximum pressure" on the Unions to negotiate. In this regard the Unions would be advised in writing that they should engage with the first respondent on the decision to dispose of the said services, failing which the first respondent would "activate dispute resolution mechanisms"

[28] In a letter dated 26 May 2003 from Dr Wallace Mgoqi, the city manager, to Mr Adams, the applicant was informed that the "new political leaders of the City" were applying their minds to the macro- and micro-structures previously proposed by the first respondent. A "revised mandated position" would be communicated to the applicant as soon as possible, following which it was trusted that the necessary consultation process would "continue as one of urgency". In the meantime the first respondent had reached "a clear, mandated view" that the market and abattoir did not constitute "core business of the City" and should be sold, while affected employees should be redeployed in accordance with an agreement concluded in terms of section 197(2) of the LRA. In reaching this view the first respondent had explored various options for the sale of the market and abattoir, had appointed transaction advisors and had tested the reaction of the

market. In this regard Dr Mgoqi stated:
It must be highlighted that these actions should not be misconstrued as pre-empting any collective bargaining process to be engaged in with the trade unions on the proposed disposal of the Market and Abattoir. Rather, the City remains committed to continue discussing these issues with the trade unions in terms of the principles in the "micro design process agreement" concluded on 1 February 2002 ("the process agreement").

[29] Dr Mgoqi emphasised that there was no reason for delaying consultations relating to the disposal or otherwise of the market and abattoir or to the conclusion of an agreement in terms of section 197(2) of the LRA. Inasmuch as the Unions had adopted a qualified stance in this regard, the first respondent was prepared to consult with them "in a forum outside of the structures of the process agreement". In particular it proposed that "the consultation should commence immediately".

[30] In a letter dated 30 May 2003, Mr Adams responded to the said letter on behalf of the applicant, stating that it indicated a deviation from and pre-empting of the process agreement. He suggested that the first respondent had already made up its mind about the market and abattoir and had no intention of engaging the Unions in a meaningful manner. Instead, it wished to use the agreement for purposes of transferring staff. This flew in the face of previous commitments and undertakings given by the first respondent and the RWG. He hence threatened to take legal action.
[31] Despite this threat the first respondent, at the end of May and early June 2003, placed advertisements in a number of newspapers, including the *Sunday Times*, *Business Day*, the *Cape Times* and the *Burger*, inviting interested parties to submit "pre-qualification bids" for the market by 23 June 2003. The introductory paragraph of the advertisement published in the *Sunday Times* of 1 June 2003 reads as follows:
It is the intention of the City of Cape Town (the City) to offer the Epping National Fresh Produce Market (Epping Market) business for sale to the private sector, as it is not central to its activities. The City envisages retaining ownership of the Epping Market property and leasing the property on a long-term basis to the successful Bidder for the business.

[32] According to the minutes of a project committee meeting held on 6 June 2003, the applicant thereupon sought a separate meeting with the first respondent on the basis that it might be agreeable to the sale of the abattoir but not the market. It was likely to retain this position for as long as the message from the first

respondent was that the decision to sell the market was open to consultation.

[33] In a letter dated 20 August 2003, Dr Mgoqi intimated to Mr G Beukman, the manager of the third respondent, that there had been a meeting of the RWG on 13 August 2003. At that meeting the first respondent had advised the Unions of its intention to withdraw the proposed new micro-organisation structure presented to them on 27 September 2002 and to endeavour to place employees by December 2003. With this aim in mind, and for purposes of "stabilising the organisation", it would negotiate with the Unions with a view to amending the process agreement or of concluding a new agreement. In addition it expressed the intention to "engage the unions in good faith to champion this intended process". It remained committed to the placement agreement and gave the assurance that placement would materialise once a new structure had been consulted on with the Unions. It would in due course be engaging the Unions in the RWG and the Bargaining Council "on the substantive and procedural aspects of the restructuring process".

[34] Arising from the invitation to interested parties to submit pre-qualification bids, the first respondent short-listed three bidders for the market, including the second respondent, on 27 August 2003, and called upon them to submit full and formal tenders by 24 November 2003.

[35] In a confidential, internally distributed summary of the discussion in the bargaining council meeting of 18 September 2003, it was recorded that the Unions had been advised that the first respondent's position remained that it intended disposing of the market and abattoir. The Unions had accordingly been invited to discuss the future of the staff with the first respondent. The applicant, it was said, had reserved its rights on the matter. This gave rise to an "action note" indicating that Councillor Thee was managing the process "at a political level" as a result of the applicant's position. Meetings between various role players were taking place to ensure that the process was being properly managed.

[36] At a meeting of the bargaining council held on 20 November 2003, the first respondent requested that the Unions consider a draft agreement between the first respondent and individual employees in terms of section 197(6) of the LRA. The applicant expressed its dissatisfaction with this request since it would pre-empt ongoing consultations about the restructuring process, including whether or not the market and abattoir should in fact be sold. It considered the first respondent's attitude no longer to apply the process agreement to the market and abattoir as "a complete about face" that conflicted with its earlier correspondence and representations. The applicant thereupon indicated that it intended lodging a dispute with the bargaining council and would seek an expedited arbitration in terms of the process agreement.

[37] On 4 December 2003 the Mayor and mayoral committee, being the successor to the executive committee, resolved that the second respondent be accepted as the preferred bidder for the market and that negotiations be set afoot to finalise a contract of sale and lease. The outcome of the negotiations was to be reported to the City Council for ratification and approval prior to acceptance.

[38] On 6 December 2003 officials of the first respondent made a power-point presentation to assembled workers at the market indicating that the preferred bidder would be entering into negotiations with the first respondent's transaction advisors in order to finalise the sale of the market. In line with its consistent

commitment to retain the market workers in the City of Cape Town, the first respondent would endeavour to arrange alternative placement for them. This was the purpose of the draft agreement tabled at the bargaining council meeting of 20 November 2003, which was directed at ensuring that the workers would not transfer with the business. In this regard the workers were informed that the third respondent had expressed its willingness to discuss the draft agreement, but that the applicant had given notice of its intention to lodge a dispute. If the first respondent were unable to reach an agreement with the applicant, the applicant's members would transfer to the new business while the third respondent's members would remain with the first respondent. Inasmuch as the new owner would probably take occupation of the business by 1 March 2004, the first respondent would have to achieve agreement with the Unions by the end of January 2004, failing which it would "make a decision for the SAMWU members to transfer to the new business".

[39] After the publication of a newspaper article in the Cape Argus of 18 December 2003 confirming the imminent sale of the market, the applicant's attorneys addressed a letter, dated 19 December 2003, to the first respondent. Therein the applicant sought an undertaking that the first respondent would not conclude any agreement of sale relating to either the market or the abattoir without first reaching agreement with the applicant concerning its members. In addition no such agreement should be concluded pending finalisation of the dispute to be lodged by the applicant with the bargaining council.

[40] Despite two subsequent letters of reminder, dated 8 and 12 January 2004 respectively, the first respondent failed to respond. On 16 January 2004 the applicant referred a dispute to the bargaining council in regard to the interpretation and application of the process agreement. In seeking the reversal of all acts required to achieve and retain the *status quo*, the applicant alleged that the first respondent had taken unilateral actions in breach of the process agreement. When the arbitration proceedings commenced on 23 February 2004 the first respondent challenged the bargaining council's jurisdiction to arbitrate the dispute. The proceedings were postponed to 10 March 2004 and were then stayed pending the decision of this court.

[41] In the meantime, on 4 February 2004 the mayoral committee resolved to sanction the sale of the market to the second respondent and to grant authority for the signing of the sale of business and lease of property agreements. This was made subject to quarterly progress reports being submitted to the mayoral committee on the redeployment of affected staff at the market. In this regard the first respondent informed such staff on 20 February 2004 that their employment at the market would terminate on 27 February 2004, since the second respondent was taking over on 1 March 2004.

[42] On 24 February 2004 the applicant's attorneys formally notified the first respondent that it would launch urgent legal proceedings unless the first respondent undertook not to dispose of the market and abattoir unilaterally. On that very day, however, the first and second respondents concluded an agreement of sale in respect of the market business as a going concern, subject to the conclusion of a lease agreement relating to the market property.

[43] In a letter dated 25 February 2004, the first respondent's attorneys responded to the applicant's letter of 19 December 2004 and subsequent letters.

They pointed out that the applicant's opposition to the sale of the market and abattoir was in line with the stance taken by the Confederation of South African Trade Unions ("COSATU"), namely that the sale constituted privatisation. In view of its strong opposition to privatisation, the applicant's position appeared to be "an entrenched one", in which event it was anticipated that the applicant would never support any agreement having the effect of privatisation. The first respondent was, therefore, not prepared to give any undertaking regarding the sale of the market. It was, however, still quite prepared to consult with the applicant regarding its members on the basis that they sign agreements with the first respondent in terms of section 197(6) of the LRA, as the third respondent's members had done.

[44] On 26 February 2004 the applicant launched the present application, averring *inter alia* that the mayoral committee had lacked the requisite authority to conclude the agreement of sale with the second respondent. The City Council responded on 28 May 2004 by ratifying the mayoral committee's resolution of 4 February 2004. The issue of placement of its members working at the market was resolved on 27 February 2004 when the first respondent agreed to transfer such workers to other positions in the City of Cape Town by no later than close of business on that day.

**THE CASE FOR THE APPLICANT**

[45] The applicant has attacked the first respondent's decision to sell the market on four grounds, namely:

a) it failed to comply with a number of mandatory procedural duties required in terms of sections 4 and 5 of the Systems Act;

b) it was in breach of the process agreement;

c) the mayoral committee lacked the authority to conclude the sale and the subsequent attempt by the City Council to ratify it was bad in law;

d) the decision was taken in bad faith.

[46] The basis of the argument relating to the Systems Act is that, in terms of section 4(2)(e) thereof, the first respondent is obliged to consult the local community about the level, quality, range and impact of municipal services provided by it. In this regard it is required to solicit, consider and assess the views of the local community when giving consideration to the outsourcing or privatisation of municipal services. Section 5(1)(a)(i), in turn, accords members of

the local community the right to contribute to the first respondent's decision-making process. In the present matter, the applicant argued, the first respondent failed to give notice to or invite comment from the local community regarding its decision to dispose of the market and abattoir.

[47] The applicant suggested in this regard that the first respondent's aforesaid omission gave rise to a right of review under sections 6(2)(b), 6(2)(f)(i) and 6(2)(i) of the *Promotion of Administrative Justice Act* 3 of 2000 ("PAJA"). These sections relate to non-compliance with a mandatory and material procedure prescribed by an empowering provision, contravention of a law by the action itself and unlawfulness or unconstitutionality of the action. In the alternative it argued that the decision was subject to review under the principle of legality implicit in the Constitution (Act 108 of 1996).

[48] As mentioned before (par [3] above), the applicant accepted that it had received notice and been given adequate notice to comment in its own right as a trade union representing the municipal workers it had recruited as members. It averred, however, that it had not been given an opportunity to comment in its capacity as an organ of civil society or as a labour organisation involved in the local affairs of the first respondent. It had a right to represent other community members who shared its interest in the privatisation issue and in any event it had the standing to approach this court on a matter of public interest.

[49] The argument involving a breach of the process agreement related to the procedures prescribed by such agreement, which the applicant alleged the first respondent had failed to follow. More specifically issues on which no agreement could be reached had to be referred, in terms of section 3.11 of the agreement, to the bargaining council. If agreement could still not be reached, the matter should be referred to arbitration regarding the interpretation or application of the agreement. According to the applicant the first respondent had flouted these procedures by making a decision before the process of negotiation had been exhausted and any resulting deadlock had been referred to the bargaining council. Such decision was hence null and void.

[50] The applicant rejected the first respondent's argument that the dispute in question was cognisable by the LRA and should not have been brought to this court. Inasmuch as the validity of the decision to privatise was the focus of the attack the resulting dispute was not a labour dispute but a constitutional issue.

[51] The applicant likewise rejected the first respondent's argument that the process agreement had lapsed. It submitted that the parties had continued to treat it as operative and must be held to have renewed it expressly or by conduct. Alternatively the first respondent should be estopped from contending that the agreement had lapsed by virtue of its various undertakings to apply the agreement, thereby creating a legitimate expectation that it would continue to operate.

[52] By the same token the first respondent's point, namely that the process agreement did not apply to the decision to privatise since the market and abattoir were not "micro-designs", fell to be rejected. The applicant argued that micro-designs encompassed the privatisation of services, including the market and

abattoir.
[53] The applicant's argument regarding the alleged lack of authority of the mayoral committee was that it had purported to act in terms of delegated authority. This would not be appropriate under section 59(1)(a) of the Systems Act, in that it involved the power to privatise a municipal service or entity. In any event, the mayoral committee had expressly referred the final decision to the City Council, which, in the applicant's view, was the only municipal body vested with the power to make such decision.
[54] The attempt by the City Council to remedy the situation by purporting to ratify the decision was, according to the applicant, out of time and of no effect.
[55] The argument relating to the first respondent's alleged bad faith was that its conduct was "redolent of temporising, high-handedness and a cavalier disregard of the applicant's rights". The *mala fides* were so egregious that this court should set aside the decision.

**THE CASE FOR THE FIRST RESPONDENT**

[56] At the outset the first respondent brought an application to strike out substantial portions of the replying and further replying affidavits of Mr Adams, on the grounds of their introducing new matter or otherwise being scandalous, vexatious, argumentative and irrelevant. It sought also to strike out the whole of nine supplementary replying affidavits purportedly introducing new matter in reply.

[57] In an affidavit by Mr Michael Marsden, the first respondent's executive director: development and infrastructure, raised as a point *in limine* the applicant's unreasonable delay in bringing the present application. This was based on the fact that the executive committee of the first respondent had, as far back as May 2002, taken a decision in principle to dispose of the market and abattoir. Yet the applicant chose to wait until 26 February 2004 before launching such application. In the result both the first and second respondents would suffer irremediable and irreversible prejudice should the application be successful. Both had expended large sums of money, which they would certainly lose if the *status quo* should be restored. At the same time many persons who had been redeployed by the first respondent, or employed by the second respondent, would be seriously affected and might in fact lose their employment. This would inevitably lead to the closure of the market.
[58] If indeed the applicant was not seeking to review the in principle decision taken in May 2002, but was in fact attacking the mayoral committee's decision of 4 February 2004, a further point *in limine* would arise. This was that the applicant had, in conflict with section 7(2)(a) of PAJA, failed to exhaust its internal remedies by not making use of the appeal procedures provided for in section 62 of the Systems Act. Nor could it rely on the exemption in terms of section 7(2)(c) of

PAJA, namely that there were exceptional circumstances present or that it was in the interests of justice, to allow a deviation from this rule. The City Council's ratification of the mayoral committee's decision on 28 May 2004 did not, it was argued, preclude the Council, or a special committee convened for this purpose, from hearing an appeal.

[59] In the alternative a decision in principle was not, and could not be, a final decision, in which event it was not susceptible to review. Similarly it could not constitute administrative action in terms of PAJA, thereby barring any review.

[60] For the rest the first respondent rejected the various grounds raised by the applicant in its attempt to have the sale of the market set aside. The Systems Act did not, in its view, assist the applicant in that the provisions relied upon it were not applicable to the market and abattoir. In the alternative, if they were applicable, they had been complied with. The first respondent stressed that neither the Systems Act nor the Structures Act, nor any other legislation, precluded the sale of assets or facilities such as the market or abattoir. No statutory provision required a municipality to continue operating a business at a loss. In any event the first respondent was not selling a municipal service and was not divesting itself of its powers and obligations relating to the market and abattoir as local government functional areas.

[61] As for the process agreement the first respondent persisted with its argument that it does not apply to the market or abattoir and that this court does not have jurisdiction to consider whether or not there has been compliance with the provisions of such agreement. In terms of section 24 of the LRA, the jurisdiction to arbitrate in respect of the disputes alleged by the applicant vest exclusively in the CCMA or an arbitrator appointed by the bargaining council. In any event the agreement had lapsed through effluxion of time and could not be revived by the principles of estoppel or legitimate expectation. In the alternative, even if the agreement did apply and this court had the jurisdiction to deal with it, the first respondent had complied with its provisions in so far as they were applicable. According to the first respondent the applicant had been given every opportunity to make representations regarding the proposed disposal of the market and abattoir, but had studiously avoided availing itself of such opportunities. It had in fact declined throughout to reveal the representations it would have made had it not allegedly been precluded from doing so. In this regard the first respondent's reasons for selling the market and abattoir were never challenged and the applicant failed to offer any other viable alternative to the proposed disposal of such services. The first respondent denied strenuously that it had acted in bad faith at any time.

[62] The first respondent denied that the applicant had made out a case for interdictory relief in respect of the abattoir. It had not established any of the fundamental prerequisites for an interim interdict. More particularly it had not demonstrated having suffered irreparable harm or that there was no suitable existing remedy available to it.

**THE CASE FOR THE SECOND RESPONDENT**

[63] In an affidavit by its chief executive officer, Mr C J Hamilton, the second

respondent associated itself with the submissions of the first respondent, emphasising that the second respondent would suffer substantial prejudice and loss should an interim interdict be granted. He agreed with Mr Marsden, in his affidavit on behalf of the first respondent, that the urgency on which the applicant relied was of its own making and that it had unreasonably delayed in bringing the present application.

[64] Mr Hamilton described the second respondent as "a management led consortium with a 67% black economic empowerment component". Its successful negotiation of the purchase of the market was the culmination of "a long and transparent public tender process" as set forth in the applicant's and first respondent's papers. If implementation of the agreement reached should be prevented, he said, the second respondent stood to lose a complex financing arrangement which could lead to abandonment of the transaction and irreversible prejudice for the second respondent.

[65] Of particular importance was the human resources aspect, which gave rise to the appointment of some 36 staff members and subcontractors for security, maintenance, cleaning and other services. These persons have, in turn, employed more than 80 persons for a combined salary of some R475 000,00 per month. For the rest some R3 million was invested in information technology, while transaction costs exceeded R3 million.

[66] In addition, Mr Hamilton pointed out, highly skilled and motivated individuals, who had been specifically recruited to hold top positions, could lose their employment or resign if the market transaction should be delayed or prevented. In addition many hundreds of other persons, including market agents, wholesalers, utility traders, grocers and informal traders, all of whom made use of any number of employees and were dependent on the market to make a living, would be drastically affected. The applicant had not given any undertaking to compensate the second respondent for damages it would inevitably incur should its envisaged proceedings against the first respondent be unsuccessful.

[67] In view of these considerations the second respondent denies that the balance of convenience favours the granting of interim relief. On the contrary, it avers that such balance weighs heavily against the applicant.

[68] I turn now to consider the various submissions made on behalf of the respective parties. In doing so I shall have regard to the facts and circumstances set forth above, as also to the relevant statutory provisions and authorities.

## THE ALLEGED NON-COMPLIANCE WITH THE SYSTEMS ACT

### *The Relevant Provisions of the Systems Act*

[69] Section 1 contains a number of definitions, of which the following may be

of some relevance in the present context:

**basic municipal services** means a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment; …

**local community** or **community,** in relation to a municipality, means that body of persons comprising -
*a)* the residents of the municipality;
*b)* the ratepayers of the municipality;
*c)* any civic organisations or bodies which are involved in local affairs within the municipality; and
*d)* visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality
and includes, more specifically, the poor and other disadvantaged sections of such body of persons; …

**municipal service** means a service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community irrespective of whether -
*a)* such a service is provided, or to be provided, by the municipality through an internal mechanism contemplated in section 76 or by engaging an external mechanism contemplated in section 76; and
*b)* fees, charges or tariffs are levied in respect of such a service or not; …

[70] Chapter 2 deals with the legal nature and rights and duties of municipalities. Section 2(a) describes a municipality as "an organ of state within the local sphere of government exercising legislative and executive authority". In terms of section 2(b) it consists of "the political structures and administration of the municipality", on the one hand, and "the community of the municipality" on the other. Section 2(d) provides that it has "a separate legal personality which excludes liability on the part of the community for the actions of the municipality".

[71] The rights and duties of municipal councils are enumerated in section 4, the relevant portions of which read thus:
1) The council of a municipality has the right to -
   *a)* govern on its own initiative the local government affairs of the local community;
   *b)* exercise the municipality's executive and legislative authority, and to do so

without improper interference; …

2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to -
   *a)* exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community;
   *b)* provide, without favour or prejudice, democratic and accountable government;
   *c)* encourage the involvement of the local community
   *d)* strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner;
   *e)* consult the local community about -
      i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and
      ii) the available options for service delivery;
   *f)* give members of the local community equitable access to the municipal services to which they are entitled; …

[72] Section 5, again, deals with the rights and duties of members of the local community. The relevant portions of this section read as follows:

1) Members of the local community have the right -
   *a)* through mechanisms and in accordance with processes and procedures provided for in terms of this Act or other applicable legislation to -
      i) contribute to the decision-making process of the municipality; and
      ii) submit written or oral recommendations, representations and complaints to the municipal council or to another political structure or a political office bearer or the administration of the municipality;
   *b)* to prompt responses to their written or oral communications, including complaints, to the municipal council or to another political structure or a political office bearer or the administration of the municipality;
   *c)* to be informed of decisions of the municipal council, or another political structure or any political office bearer of the municipality, affecting their rights, property and reasonable expectations;
   *d)* to regular disclosure of the state of affairs of the municipality, including its finances;
   *e)* to demand that the proceedings of the municipal council and those of its committees must be -
      i) open to the public, subject to section 20;
      ii) conducted impartially and without prejudice; and
      iii) untainted by personal self-interest; …

2) Members of the local community have the duty -
   *a)* when exercising these rights, to observe the mechanisms, processes and procedures of the municipality;
   *b)* …

*c)* to respect the municipal rights of other members of the local community; …

[73] In chapter 4 provision is made for community participation in general. Section 16(1) requires a municipality to "develop a culture of municipal governance that complements formal representative government with a system of participatory governance". In terms of section 16(2), however, this "must not be interpreted as permitting interference with a municipal council's right to govern and to exercise the executive and legislative authority of the municipality".

[74] In terms of section 17(1) participation by the local community in the affairs of the municipality must take place through:

*a)* political structures for participation in terms of the Municipal Structures Act;
*b)* the mechanisms, processes and procedures for participation in municipal governance established in terms of this Act;
*c)* other appropriate mechanisms, processes and procedures established by the municipality;
*d)* councillors;
*e)* generally applying the provisions for participation as provided for in this Act.

[75] The municipality's obligation in this regard is set forth in section 17(2):

A municipality must establish appropriate mechanisms, processes and procedures to enable the local community to participate in the affairs of the municipality, and must for this purpose provide for -

*a)* the receipt, processing and consideration of petitions and complaints lodged by members of the local community;
*b)* notification and public comment procedures, when appropriate;
*c)* public meetings and hearings by the municipal council and other political structures and political office bearers of the municipality, when appropriate;
*d)* consultative sessions with locally recognised community organisations and, where appropriate, traditional authorities; and
*e)* report-back to the local community.

[76] Information acquired in respect of participation by the community must be communicated to such community in terms of section 18, sub-section (1) of which reads:

A municipality must communicate to its community information concerning -

*a)* the available mechanisms, processes and procedures to encourage and facilitate community participation;

*b)* the matters with regard to which community participation is encouraged;
*c)* the rights and duties of members of the local community; and
*d)* municipal governance, management and development.

[77] Section 21 provides that all communications to the local community in terms of the Systems Act must be effected through the media, namely local newspapers, newspapers circulating in the municipality's area or radio broadcasts covering such area. Section 21(4) reads:

When the municipality invites the local community to submit written comments or representations on any matter before the council, it must be stated in the invitation that any person who cannot write may come during office hours to a place where a staff member of the municipality named in the invitation, will assist that person to transcribe that person's comments or representations.

***Main Submissions on behalf of the Applicant***

[78] In his argument on behalf of the plaintiff Mr Brassey relied strongly on the provisions of sections 4(2)(e) and 5(1)(a)(i) of the Systems Act. The duty resting on the municipality in terms of the former and the correlative right of the local community in terms of the latter, he submitted, were not "vague, aspirational platitudes". They gave "practical effect to the foundational constitutional values of participatory democracy, accountability, responsiveness and openness and one of the central objects of local government embodied in the Constitution". He referred in this regard to the founding provisions of the Constitution, as reflected in section 1(d) thereof. He further cited section 152(1)(e), in which one of the objects of local government is described as "to encourage the involvement of communities and community organisations in the matters of local government". Similarly section 195(1), cited in section 6(1) of the Systems Act in regard to the duties of municipal administrations, was applicable in that it required public administration to be "governed by the democratic values and principles enshrined in the

Constitution".

[79] In this regard Mr Brassey distinguished between "formal representative government" and "participatory governance" which requires a municipality to develop a culture of community participation as provided in section 16(1) of the Systems Act. Section 16(1)(a) specifically requires it to "encourage, and create conditions for, the local community to participate in the affairs of the municipality", including (section 16(1)(a)(v)) "strategic decisions relating to the provision of municipal services in terms of Chapter 8". This would accord with an important statement appearing in the preamble of the Act, namely:
…a fundamental aspect of the new local government system is the active engagement of communities in the affairs of municipalities of which they are an integral part, and in particular in planning, service delivery and performance management …

[80] In expanding upon this argument Mr Brassey emphasised the importance and purpose of procedural fairness as a means of preventing arbitrariness in coming to an objectively justifiable decision. This required proper notice to and full consultation with interested parties.

[81] In the present matter Mr Brassey submitted that the first respondent had breached its duty to consult the local community as required by section 4(2)(e) of the Systems Act. In line with section 4(2)(e)(i), he argued, the proposed sale of the market constituted a significant alteration to "the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider". The decision to privatise the market, he suggested, was analogous to a decision to provide, significantly upgrade, extend or improve a municipal service, or to review an existing delivery mechanism. In terms of section 21(1) and (4) the first respondent should have invited the local community to submit written comments and representations on the privatisation proposal. Only after proper consideration thereof could it have taken a decision to sell the market.
[82] Although the applicant originally relied on the first respondent's alleged failure to consult with it and its members, it purports now to be acting in the public interest and as a member of the local community in its attack on the first respondent's failure to consult with the local community. Mr Brassey submitted in this regard that it had the authority to do so in terms of section 38(c) and (d) of the Constitution. This provides that a person acting as a member, or in the interest, of a group or class or persons, or anyone acting in the public interest, may approach a competent court to enforce a right contained in the Bill of Rights, should such right be infringed or threatened.
[83] The applicant rejected the first respondent's contention that it was not required to consult with the local community on its decision to sell the market, but simply to assess the views of organised labour in terms of section 78(1)(v) of the Systems Act. The applicant likewise rejected the contention that the first

respondent had assessed such views through the mediation of the Unicity Commission and the ODA (par [8] and [15] above). Mr Brassey submitted in this regard that the first respondent was not permitted to delegate or "outsource" its duty to consult.

[84] Mr Brassey submitted further that, even if the first respondent had been authorised to make use of an agent or delegate to enforce its right and concomitant duty to consult with the local community, the range of persons consulted was too limited to constitute the local community. There should have been consultation with informal traders and hawkers who made regular use of the market, market agents, members of the applicant, residents, ratepayers, consumers and even visitors who made use of the market facilities. All such persons, he said, had a direct and substantial interest in the manner in which the first respondent provides services. Inasmuch as they had not been consulted, the decision to sell the market was vitiated and gave rise to a right of review in terms of section 6(2)(b), 6(2)(f)(i) and 6(2)(i) of PAJA. It likewise fell to be set aside under the principle of legality implicit in the Constitution (par [47] above).

[85] Mr Brassey suggested that the first respondent was seeking to escape the consequences of its breach of the Systems Act by raising technical defences such as the applicant's lack of *locus standi*. He accepted that the applicant had received notice and had been given adequate opportunity to comment in its own right as a trade union (par [3] and [48] above). It had not, however, been given an opportunity to comment in its capacity as an organ of civil society, or as a labour organisation, involved in local affairs. By acting in this latter capacity it was in fact acting in the public interest. More particularly it had an interest in the impact that the discontinuation of a municipal service might have upon workers both within and outside the employ of the municipality.

[86] Not only was the first respondent's failure to consult with the local community in breach of the Systems Act, but it also breached the local community's right, in terms of section 33(1) of the Constitution, to lawful and procedurally fair administrative action. This gave the applicant the right, Mr Brassey argued, to bring the present application in the public interest as provided by section 38 of the Constitution.

***Main Submissions on behalf of the First Respondent***

[87] Mr Rose-Innes noted at the outset of his argument on behalf of the first respondent that the applicant had effected a complete *volte face* by abandoning its constitutional argument relating to the first respondent's alleged failure to comply with section 78 of the Systems Act. This was a wise decision in view of the judgment against the applicant in the municipal police service case reported as *South Africa Municipal Workers Union v City of Cape Town and Others* 2004 (1) SA 548 (SCA) ("the SAMWU police service case"). In similar vein, Mr Rose-Innes submitted, was the presentation of its main argument as the first respondent's alleged failure to consult it, in terms of section 4(2)(e) of such Act, as a representative of the local community. This was not its case as set forth in the founding or supporting affidavits filed on its behalf. As a result it rendered a great deal of the applicant's case irrelevant inasmuch as the emphasis was placed throughout on the first respondent's alleged failure to consult with the applicant as

a trade union. For this reason a large proportion of the applicant's case on the papers fell to be struck out.

[88] On the merits of the application Mr Rose-Innes submitted that the applicant had made insufficient averments to sustain the cause of action on which it relied. The gist thereof was contained in a tiny proportion of the lengthy affidavits filed by it and consisted, for the most part, of unsubstantiated allegations that the first respondent had acted in breach of the Systems Act. This applied not only to its initial stand that the first respondent had failed to consult it in its capacity as a trade union, but also to its later stand that it had not been consulted as a representative of the local community. No evidence was adduced that the first respondent had failed to afford any member of the local community the opportunity to consult on any of the issues contemplated by section 4(2)(e) of the Systems Act. There was likewise no evidence of any person or organisation, other than the applicant, who or which felt aggrieved about the consultation process. This rendered the applicant's case woefully inadequate in that it contained little or no factual evidence (*facta probantia*) in substantiation of the allegations the application was called upon to prove (*facta probanda*). See *Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C-H; *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Another* 2003 (4) SA 207 (C) par [28] at 217A-E.

[89] The strategy of the applicant, Mr Rose-Innes suggested, had been one of consistent non-co-operation in view of its implacable resolve to resist any form of what it regarded as privatisation of municipal services. It had, for ideological reasons, clearly demonstrated its vehement opposition thereto by refusing to engage in face-to-face discussions on the issue, which it regarded as being contrary to the interests of its members. It was for this reason that it created the Cape Town Anti-Privatisation Forum during July 2000 (par [10] above).

[90] When the applicant realised that it was unable to rely on a failure to consult with it as a trade union, it latched onto its purported role as a member of the local community without laying a basis for, or otherwise demonstrating, its authority (*locus standi*) to do so. In this regard it simply stated that it had not been given the opportunity to comment as an organ of civil society or as a labour organisation involved in local municipal affairs. In addition it sought to bolster this purported function by stating that it was acting in the public interest and simultaneously in its own interest and in that of its members.

[91] Mr Rose-Innes rejected this argument as "casuistic" in that the applicant and its members had been given numerous opportunities, at feedback sessions, bargaining council meetings and in correspondence, to comment on the proposed sale of the market. The applicant's attempt "to convey the same message wearing some notionally different hat" amounted to pure "sophistry". It could not, for purposes of the present proceedings, be regarded as "an organ of civil society" or "a labour organisation … involved in local affairs within the community". In terms of section 200(1) of the LRA the authority of a trade union is limited to acting "in its own interest" or "in the interest of its members" in any dispute to which any of its members may be a party. The local authority does not interrelate with a trade union as the representative of the local community. And certainly, Mr Rose-Innes argued, it cannot *ex post facto* announce its presence as a member of the local community, complaining that it has not been consulted in this capacity.

No such complaint was ever lodged until litigation commenced.

[92] Mr Rose-Innes likewise rejected the applicant's contention that it was acting in the public interest in that it did not have such standing under the Constitution. Section 38 of the Constitution, on which the applicant relied, was available only where a right in the Bill of Rights has been infringed or threatened. Similarly section 33(1) of the Constitution was not applicable since the decision to sell the market did not involve administrative action but in fact constituted the exercise of an executive power or function concerning a policy matter. The officials concerned were not implementing legislation or exercising a public duty, but were making a policy decision as to what was in the best interests of the municipality and its residents.

[93] The distinction between executive and administrative action has been distilled by the Constitutional Court in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) par [141]-[143] at 67A-68B. There it is clearly stated that the nature of the power being exercised will determine whether it is administrative or executive, or even legislative. The relevant guidelines are laid down (in par [143] of the judgment) with eminent clarity and lucidity:

Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.

[94] Generally speaking policy matters are not administrative, but in every case all the relevant factors must be considered. See also *Steele v South Peninsula Municipal Council* 2001 (3) SA 640 (C) at 643-644; *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA); *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2004] 3 All SA 446 (C) par [13]-[18] at 454*i*-457*f*; *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA) par [15] at

270C-E. Our courts have in general been reluctant to interfere in what they regard as policy-laden issues. See *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) par [21] at 471A-C; *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2004 (5) SA 91 (C) par [60]-[64] at 108A-109I.

[95] Mr Rose-Innes submitted further that the applicant did not have *locus standi* to act in the public interest under common law, as suggested *en passant* by Mr Brassey. In the *locus classicus* on the topic, namely *Director of Education, Transvaal v McCagie and Others* 1918 AD 616 at 621, Innes CJ made it clear that "a private individual can only sue on his own behalf, not on behalf of the public". An exception has been recognised where affected persons cannot represent themselves. See *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA 294 (A). In the present case, Mr Rose-Innes submitted, no suggestion was made that interested or aggrieved members of the local community were unable to act in their own interest.

[96] In the alternative, Mr Rose-Innes argued, even if the applicant had made sufficient averments to sustain its case and even if it should have the necessary *locus standi*, the provisions of section 4(2)(e) of the Systems Act were in any event inapplicable. The said section required the municipal council to consult the local community about the level, quality, range and impact of municipal services, whether provided directly by the municipality or indirectly through the mediation of another service provider. It also required consultation as to the available options for service delivery. In the present matter the proposed disposal of the market did not involve the provision of a municipal service, but rather the sale or disposal of a municipal asset. Hence section 4(2)(e) could not be applicable. Mr Rose-Innes referred in this regard to the link between sections 4, 5, 77 and 78 of the Systems Act as illustrated in the SAMWU police service case (par [87] above) and as acknowledged by the applicant in its founding and supplementary affidavits.

[97] The sale or disposal of a capital asset, Mr Rose-Innes submitted, was not regulated by the Systems Act but by sections 14 and 90 of the *Municipal Finance Management Act* 56 of 2003 ("the Finance Management Act"). These sections deal with the disposal of capital assets by municipalities and municipal entities respectively. Sections 14(1) and (2) are hence applicable and read thus:

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.

From the facts set forth above, Mr Rose-Innes argued, there has been full compliance with these provisions.

[98] In the further alternative Mr Rose-Innes submitted that, even should the provisions of section 4(2)(e) of the Systems Act be applicable, the first respondent has in any event complied therewith in all respects. This appears from the background facts set forth above (par [6]-[44]). These paragraphs do not purport to present a full and exhaustive record of all the relevant consultations and discussions between the applicant or its members on the one hand and employees of the first respondent on the other. The reason is that consultation with the applicant, in its capacity as a member of the local community, was not the case the first respondent was initially required to meet. It is nevertheless quite clear that the first respondent sought on numerous occasions to consult with the applicant and its members and provided ample opportunities for comment on the proposed sale of the market, be it by way of meetings, feed-backs or media invitations to participate and comment. In whatever capacity it purported to act, however, the applicant failed to make use of such opportunities by virtue of its deliberate decision not to co-operate with the first respondent (par [89] above).

[99] A final alternative raised by Mr Rose-Innes was that, even should the applicant overcome all the aforesaid obstacles, it could not be said that a failure to consult in terms of section 4(2)(e) of the Systems Act vitiated the decision to sell the market. This appears from the difference in wording between section 4(2)(e) and section 78. In the former the municipal council is burdened with the duty merely to consult the local community, whereas the latter requires that the municipality must first assess the views of organised labour before deciding on an appropriate mechanism to provide a municipal service. If there has been no assessment as required by section 78, a case may be made out for setting aside the decision in question. In terms of section 4(2)(e), however, consultation is not required prior to the decision in question being taken and a failure to consult would not vitiate the decision.

***Consideration of the Respective Submissions***

***The Spirit of the Act***

[100] The introduction to the Systems Act states at the outset that it is intended to provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all; to define the legal nature of a municipality as including the local community within the municipal area, working in partnership with the municipality's political and administrative structures; to provide for the manner in which the municipal powers and functions are exercised and performed to provide for community participation …

This participation of the local community is stressed in the preamble where it is stated that

a fundamental aspect of the new local government system is the active engagement of communities in the affairs of municipalities of which they are an integral part, and in particular in planning, service delivery and performance management …

This conforms with
a need to create a more harmonious relationship between municipal councils, municipal administrations and the local communities through the acknowledgement of reciprocal rights and duties ...

[101] It would appear from the definition section of the Systems Act (par [69] above) that a distinction is drawn between "basic municipal services", such as electrical power, water and sewerage, and a "municipal service", such as, in the present case, the market and abattoir. The former are essential services required "to ensure an acceptable and reasonable quality of life", whereas the latter are not essential but are nevertheless provided for the general benefit of the local community, be it directly ("through an internal mechanism") or indirectly ("by engaging an external mechanism"). Section 76(a) of the Act provides for an internal mechanism by means of service delivery by direct municipal administration. Section 76(b), again, makes specific provision for an external mechanism in the form of a service delivery agreement with another institution, entity or person "legally competent to operate a business activity" (section 76(b)(v)).

[102] It is clear from sections 2 and 4(1) of the Act (par [70]-[71] above) that a municipality, as a separate legal *persona*, has wide-ranging executive, legislative and administrative rights and powers. There are curbs and limitations on such rights and powers, however, in that it is also burdened with the concomitant duties arising from section 4(2). Significantly these duties are subject to the municipality's "financial and administrative capacity" and in carrying them out regard must be had to "practical considerations" and "the best interests of the local community" (section 4(2)(a)). The municipality is, indeed, required to "encourage

the involvement of the local community" (section 4(2)(c)), as preordained in the introduction and preamble to the Act (par [100] above). This explains the need expressed in section 4(2)(e) to consult the local community about "the level, quality, range and impact of municipal services" and "the available options for service delivery".

[103] The right of the local community to become involved in, and indeed to contribute to, the municipality's decision-making process is set forth with great clarity in section 5(1)(a)(i) (par [72] above). When exercising this right, however, members of the local community are required, in terms of section 5(2), to observe "the mechanisms, processes and procedures" of the municipality and to respect the rights of other members of such community.

[104] This would appear to be in conformity with the provisions of sections 17, 18 and 21 (par [74]-[77] above). It may rightly be termed "a system of participatory governance" as envisaged in section 16 of the Act, provided it does not constitute interference with a municipal council's right to govern and to exercise the municipality's executive and legislative authority (par [73] above). The criterion to be applied in establishing whether or not there has been such interference, I would suggest, must be the reasonableness or rationality of the conduct in question. This must, of course, be assessed in the context of the overriding provision of section 7, namely that the exercise of rights and performance of duties as set forth in sections 4, 5 and 6 are "subject to the Constitution, the other provisions of this Act and other applicable legislation".

***The Applicability of Section 4(2)(e) of the Act***

[105] Before considering whether or not the applicant has made out a case for the relief claimed, it may be appropriate to consider the conflicting submissions as to the applicability of section 4(2)(e) of the Act. Mr Rose-Innes submitted (par [96]-[97] above) that the section was not applicable in the present case because the disposal of the market did not involve the provision of a municipal service. It in fact amounted to the sale of a municipal asset in terms of sections 14(1) and (2) of the Finance Management Act. Mr Brassey, however, suggested (par [81] above) that the disposal of the market constituted a significant alteration to "the level, range and impact" of a municipal service hitherto provided by the municipality.

[106] I agree with Mr Brassey. The sale of the capital assets underlying the provision of a municipal service must needs affect the "level, range and impact" of such service in that the service will be withdrawn and will no longer be provided

to the local community as a municipal service for their use and convenience. It is not simply a case of selling a municipal asset as such. Of course the sale of the market to the second respondent may be regarded as making available an alternative option for the withdrawn service. As I read section 4(2)(e), the municipality is obliged to consult with the community on both the withdrawal of the service and its disposal to the second respondent as a running business which will continue to provide market facilities. Involving the community in this way would be in accordance with the spirit of the Act (par [100] above) and would accord unequivocal recognition to the community's firmly entrenched right, contained in section 5(1)(a)(i), to contribute to the decision-making processes of the municipality.

[107] It is quite correct, of course, that the disposal of the market did involve the sale of a capital asset which was not required "to provide the minimum level of basic municipal services" in terms of section 14(1) and (2) of the Finance Management Act (par [97] above). I hence agree with Mr Rose-Innes that such provisions are applicable in the present instance, but not to the exclusion of section 4(2)(e) of the Systems Act. It would indeed appear that the first respondent has complied with the said provisions of the Finance Management Act. It is not in dispute that it decided, on reasonable grounds, that the asset was not required for providing the minimum level of basic municipal services or, for that matter, of any municipal service at all. It has likewise not been placed in issue that it gave careful consideration to the fair market value at which the asset could be sold. The financial benefit of divesting itself of the responsibility of a fresh produce market were central to the report considered by its executive committee on 7 May 2002.

***The Locus Standi of the Applicant***

[108] The question relating to the applicant's *locus standi* to bring the present application on behalf of the community elicited interesting arguments from both sides. I am inclined to agree with Mr Rose-Innes that Mr Brassey's reliance on section 38(c) and (d) of the Constitution is misplaced in that section 38 deals with the enforcement of rights contained in the Bill of Rights. It was not suggested that the right allegedly being infringed or breached in terms of the Systems Act is a constitutional right protected by the Bill of Rights. On the other hand, as I understand the definition of "local community" in section 1 of the Systems Act (par [69] above), it may be argued that the applicant qualifies as a member of the local community in terms of section 1(c). As a trade union it may be regarded as a civic organisation or a non-governmental labour organisation, or simply as a body

"involved in local affairs within the municipality". It may represent itself or its members, who would presumably qualify as members of the community, whether they reside within or outside the boundaries of the municipality.

[109] I am hence satisfied that the applicant has, at all relevant times, had the necessary *locus standi*, in terms of the Systems Act, to act on behalf of the local community. It is hence not necessary to consider the submissions made by Mr Rose-Innes regarding the legal position at common law (par [95] above).

***The Applicability of Section 33 of the Constitution***

[110] On whether or not the disposal of the market is an administrative action to which section 33 of the Constitution applies, has given rise to much academic and jurisprudential debate (par [93] above). In general it is dependent on the nature, ambit and purpose of the power being exercised. If the action being taken substantially concerns a policy matter relating to or arising from the executive or legislative powers of the body considering such matter, it would in general not be administrative.

[111] In the present matter I am inclined to the view that the first respondent's decision to divest itself of a non-essential service, which it has hitherto provided for the benefit of the local community, was a matter of policy. Inasmuch as it was based primarily on practical considerations within the context of its financial and administrative capacity (as meant in section 4(2) of the Systems Act), it was of an executive rather than an administrative nature. It would hence not qualify as an administrative action for purposes of section 33 of the Constitution.

***The Applicant's Case in terms of Section 4(2)(e) of the Systems Act***

[112] The main attack on the present application was, as submitted in some detail by Mr Rose-Innes (par [88]-[91] above), was that the applicant had failed to make sufficient averments to sustain the cause of action on which it was relying. I fully agree. In the flood of meetings, discussions and exchanges of correspondence between the respective representatives of the applicant and first

respondent over a lengthy period of time, the applicant never suggested that it was acting in any capacity other than that of a trade union representing the interests of its members. At no stage did it suggest that it was in fact acting for the community, or that it was acting in both its own interest and that of the community. Any suggestion to this effect would have been regarded as highly unusual and would inevitably have provoked any number of queries from the first respondent and, for that matter, other interested parties.

[113] Among the extremely relevant averments which the applicant has failed to make is that there is not the slightest indication that it was ever mandated by its members or resolved by its directors to take up the cudgel on behalf of the general public. There is likewise no suggestion that any member of the local community ever approached it for assistance in resisting the sale of the market, not to speak of the deafening silence regarding the existence of any mandate emanating from any single member of such community.

[114] It is quite clear that the applicant has, at all relevant times, been implacably opposed to the sale of the market and has had no interest whatever in engaging the first respondent in negotiation or consultation of any nature, despite having been given ample opportunity to do so. The only consultation in which it would have been prepared to engage would have been directed at a decision not to sell, and hence not to privatise, the market. When it realised that it could never make out a case that the first respondent had failed to consult with it prior to making its decision to sell the market, it clutched at the local community straw in a vain attempt to have a second opportunity to obstruct the sale. Yet in neither of its purported dual capacities did it move a millimetre from its entrenched stance.

[115] From these considerations it is abundantly clear, as submitted by Mr Rose-Innes (par [88] above), that the applicant's case was indeed "woefully inadequate" on any evidentiary level. I am firmly of the view that the applicant has, in effect, abused the process of court by bringing an application which cannot otherwise be described than unjustified and obstructive, its aim being throughout to stonewall the process by foisting its policy and ideology on the first respondent. That it would stoop to any means to achieve this aim is strikingly illustrated by its initiative in creating the Cape Town Anti-Privatisation Forum (par [10] and [89] above). It has clearly, at no stage, had the slightest interest in acting in the public interest or benefiting the local community.

[116] As for the first respondent I am quite satisfied that it has substantially complied with its obligations in terms of section 4(2)(e) of the Systems Act in that it has from the outset consulted fully with the local community about its intention to sell the market. The first step in this direction was the public meeting held in Khayalitsha on 15 August 2000 (par [11] above), culminating in the publication, in various newspapers, during May and June 2003, of an invitation to interested parties to submit "pre-qualification bids" for the market (par [31] above). There

has been nothing surreptitious or clandestine about its conduct and the public has been kept adequately informed of its progress and various decisions throughout the process of putting the market up for sale. It may well be that more detail could have been provided in this regard but, as correctly pointed out by Mr Rose-Innes (par [97] above), the nature and extent of the first respondent's consultation with the local community was not the case which it was initially required to meet.

**THE ALLEGED BREACH OF THE PROCESS AGREEMENT**

***The Process Agreement***

[117] The Agreement on a Micro Design Process ("process agreement") concluded on 1 February 2002 between the first respondent and the unions, being the applicant and third respondent, was, as mentioned previously (par [14] above), directed at regulating micro-design organisational structures below the level of a directorate. It may be convenient to quote the agreement as a whole:

1. All micro designs will be done in terms of this agreement and in accordance with the time-frames stipulated in this agreement.

**2. Preparatory phase of micro design process**

2.1 The purpose of this phase is to communicate and share with all stakeholders, including all employees, information regarding:

- the vision of the Council;
- the "Area Service Co-ordination and Integrated Service Delivery Model" (hereinafter referred to as the "Model") as well as the "Assessment Template" (hereinafter referred to as the "Template").

2.2 In the event of an agreement by all three parties, the Council will issue a communication. In the event of no agreement, parties may elect to issue a statement stating their own position. During this phase, the employer undertakes to develop, as a matter of urgency, a detailed communication strategy which will inform all stakeholders and role-players of the vision, micro design process and restructuring process of the Council. The Employer will provide the Trade Unions with the details of the communications strategy prior to implementation.

2.3 Between 11-20 February 2002 employees of the Council will be briefed on the Restructuring Process, the Model and the Template. This will be accomplished by holding once off briefing sessions of the 7 existing Administrations. Such sessions will be structured in such a manner that it will allow employees to state their views on the Restructuring Process, the Model and the Template and to

make submissions on additional factors which should inform the Micro Organisational Structure.

2.4 Nothing in this agreement will prevent the trade unions from briefing their members on the process or the employer from accommodating queries from employees on matters of clarification. Trade Unions will be provided with reasonable time to deal with these matters provided written requests are submitted to the employer at least 2 working days prior to the proposed date of the required meeting.

2.5 Inputs from employees via the 7 existing Administrations which should inform the Organisational Structure, and using the Template as a basis for such inputs, must reach Council by no later than 22 February 2002.

**3. Design Phase of micro design process**

3.1 This phase will be characterised by a continuous communication strategy, which will inform all role-players and stakeholders of the process and progress made.

3.2 The employer will prepare an organisational structure (micro-designs) proposal incorporating the inputs, referred to in sub paragraph 2.5 above, from employees. Where these proposals do not accommodate inputs submitted by employees, reasons will be given for such exclusions.

3.3 The structure proposed by the employer in respect of each service is to be presented to the staff employed in that service, during 4 March to 15 March 2002.

3.4 Staff are to be provided an opportunity to make representations and advance alternative proposals by no later than 29 March 2002.

3.5 The employer will consider and respond to the representations or alternative proposals made by staff and, if the employer does not agree with them, the employer will provide reasons therefor.

3.6 An opportunity will be presented to trade unions to meet with their membership to elicit input on the proposed structure. For this purpose, trade union members may take 4 hours time-off, to canvass the views of their members, subject to operational requirements.

3.7 Subsequent to the submission of the comments, the employer will submit the proposed Micro Design Structure to the Restructuring Working Group. The employer will also provide motivation for the designed structure.

3.8 The Restructuring Working Group will establish technical task teams per functional service as agreed with the view to resolving areas of disagreement on the proposed structure.

3.9 The Restructuring Working Group will consider the proposals and attempt to reach agreement by no later than 30 April 2002.

3.10 All agreements by the Restructuring Working Group shall be referred to the Bargaining Council before 20 May 2002 for ratification by no later than 7 June 2002.

3.11 All disputes between the Trade Unions and the Employer at the Restructuring Working Group shall be referred to the Bargaining Council by no later than 20 May 2002 for resolution in terms of its constitution.

**4. Placement**

4.1 The employer will endeavour to place all existing staff into its new organisational structure.

4.2 The parties shall commence negotiations on a policy in terms of which existing staff are to be placed into a new organisational structure with a view to reaching an agreement by no later than 30 April 2002.

4.3 These negotiations shall be based on the existing proposals of the parties.

4.4 Any disputes arising from such negotiations shall be referred to the Bargaining Council for resolution in terms of its constitution.

**5. Dispute resolution**

5.1 Any dispute relating to the interpretation or the application of this agreement must be resolved by means of expedited arbitration using the list of arbitrators to be agreed to by the parties.

***Factors giving rise to the Allegation of a Breach of the Process Agreement***

[118] Of some import is that the first respondent had, as early as 12 October 2001, already appointed the ODA as consultant to assess options for a possible restructuring of the market and abattoir (par [15] above). The reports arising from this assessment were discussed at an RWG meeting of 10 April 2002, on which occasion the Unions were given the assurance that the fate of the market and abattoir would be negotiated in terms of the process agreement (par [16] above).

[119] The decision of the first respondent's executive committee, on 7 May 2002, to accept the recommendation to dispose of the market, was specifically expressed to be subject to consultation with "affected" staff and the Unions (par [17] above). Mr André Adams, the applicant's provincial secretary, nevertheless described the agreement to as “the worst case of bad faith bargaining” by the first respondent (par [18] above). The subsequent meeting on 13 May 2002 between the applicant and first respondent gave rise to an agreement, facilitated by the CCMA, confirming once again that the process agreement would apply to any future negotiations regarding the fate of the market and abattoir (par [19] above).

[120] After the parties had agreed, on 26 August 2002, to extend the dates of the various phases of the process agreement (par [19] and [117] above), the first

respondent forwarded its draft proposals on an amended micro-organisational structure to the Unions. Therein the market and abattoir were expressly omitted in view of the proposal to dispose of them. This proposal was approved by the executive committee of the new ANC/NNP leadership, which recommended that the disposal process be expedited in an orderly and transparent manner (par [20] above).

[121] The acceptance of these recommendations by the City Council at its meeting of 11 December 2002, and the subsequent approval granted thereto by the Mayor of Cape Town, once again led Mr Adams to question the first respondent's good faith (par [21] and [22] above). As mentioned previously (par [22] and [23] above), the Acting City Manager, Mr Daniels, fiercely denied this and called upon the Unions to furnish their views on the proposed disposal of the market and abattoir. The prerequisite of consultation with the Unions was reiterated by Mr Thee at the RWG meeting of 19 February 2003 (par [24] above).

[122] The process appeared to be on line when, on 7 May 2003, a placement agreement was concluded, in terms of section 197(2) and (6) of the LRA, with a view to placing existing employees of the first respondent in the new organisational structure (par [25] and [26] above). Despite this apparent progress the applicant was perceived to be "stonewalling" the process (par [27] above). The new City Manager, Dr Mgoqi, thereupon renewed the first respondent's efforts to engage the applicant in consultation (par [28] and [29] above).

[123] The applicant's response to this invitation was that it constituted a breach of the first respondent's obligations in terms of the process agreement, in that the decision to sell the market and abattoir had already been taken. The first respondent was hence paying mere lip service to the consultation process (par [30] above). Once again Dr Mgoqi expressed the desire to "engage the unions in good faith" (par [33] above). When the first respondent furnished a draft agreement, in terms of section 197(6) of the LRA, to the Unions for their consideration, however, the applicant's reaction was that the first respondent had thereby terminated further consultation on the restructuring process (par [36] above). On 16 January 2004 it hence referred a dispute to the bargaining council regarding the interpretation and application of the process agreement in terms of clause 5.1 thereof (par [40] and [117] above). Such proceedings have been stayed pending the decision of this court.

[124] As pointed out in the discussion of the applicant's case (par [49] above), the applicant alleged that the first respondent had failed to refer unresolved issues to the bargaining council. Should that not have been successful, the matter should have been referred to arbitration. Any decision taken without these procedures having been followed was, according to the applicant, null and void.

[125] The first respondent's attitude was that the issue in question was a labour matter which fell within the domain of the CCMA or of an arbitrator appointed by the bargaining council. The process agreement did not apply to the market or abattoir inasmuch as they were not "micro-designs" and this court had no jurisdiction to consider whether or not there had been compliance with its provisions. In any event the agreement had lapsed through the effluxion of time and could not be revived by raising estoppel or legitimate expectation considerations. In the alternative the first respondent averred that it had complied with its obligations in terms of the agreement by giving the applicant every

opportunity to make representations regarding the disposal of the market and abattoir. The applicant had deliberately avoided making use of these opportunities and had at no stage offered any viable alternative to the disposal of the market and abattoir (par [61] above). Needless to say the applicant rejected these submissions (par [50]-[52] above).

***Main Submissions on behalf of the Applicant***

[126] In his argument on behalf of the applicant Mr Brassey submitted that this court does have jurisdiction to consider the alleged breach of the process agreement in that the issue in question does not merely relate to a labour matter requiring to be dealt with in terms of the LRA. Inasmuch as the applicant's attack is directed at the validity of the decision to privatise the market, the resulting dispute constitutes an issue of administrative law which clearly falls within this court's jurisdiction. Although the applicant has relied on a breach of the process agreement by the first respondent, it does not merely seek an order enforcing the agreement, but claims revocation of the first respondent's decision to sell the market.
[127] In this regard Mr Brassey relied on section 169 of the Constitution in terms of which a high court may, except in certain cases, decide any constitutional matter. He sought support for this contention in *Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others* 2002 (2) SA 693 (CC) par [31]-[35] at 710B-711G. In that case the Constitutional Court held that section 24 of the LRA did not clothe the Labour Court with jurisdiction to determine disputes based on constitutional rights arising from collective agreements.
[128] Mr Brassey likewise relied on section 23(1) of the Constitution, in terms of which everyone has the right to fair labour practices, and section 23(2) thereof, by virtue of which "every worker" has certain rights. It would appear that the applicant regarded itself as a "worker" for purposes of this section.
[129] On whether or not the process agreement was still *in esse* after 14 November 2002 (par [19] above), Mr Brassey argued that the initially extended target dates stipulated in the agreement (par [117] above) had subsequently been further extended. By continuing to regard the agreement as operative long after that cut-off date, the parties had, by their conduct, tacitly renewed the agreement. The first respondent, which had created a legitimate expectation in this regard, was hence estopped from averring that the agreement had lapsed.
[130] On the applicability of the process agreement to the decision to dispose of the market and abattoir, Mr Brassey rejected the first respondent's contention that it was not applicable in that the market and abattoir did not qualify as "micro-services". This, he submitted, was in conflict with the impression created by the first respondent that it regarded such services as micro-organisational design structures, the disposal of which would take place in terms of the process agreement. The first respondent had in fact given numerous assurances in this regard.
[131] Mr Brassey also dealt with the first respondent's alternative submission that, even if the process agreement were applicable, the applicant had failed to make use of the opportunities presented to it to consult with and make representations to the first respondent. In this regard he suggested, firstly, that the

matter was so embroiled in disputes of fact that it could not be resolved on the papers and, secondly, that the first respondent should have referred the matter for arbitration rather than take unilateral action.

***Main Submissions on behalf of the First Respondent***

[132] Mr Rose-Innes rejected the applicant's arguments concerning the process agreement. At the outset he submitted that it was not clear whether the applicant was relying on a breach of contract, a reviewable irregularity or a claim in terms of section 23(1) of the Constitution. Although the applicant purported to present the dispute as one relating to the interpretation and application of the process agreement, the real dispute was whether or not the applicant had, in terms of section 64(2)(d)(iii) of the LRA, refused to bargain with the first respondent. In any event a breach of a collective agreement such as the process agreement could not constitute a reviewable irregularity in terms of PAJA, while the applicant had at no stage advanced any constitutional claim in terms of section 23 of the Constitution. This could be done only where the relevant labour laws were deficient, as explained in *Walters v Transitional Local Council of Port Elizabeth and Another* [2001] 1 BLLR 98 (LC) par [18]-[32] at 104D-107D. See also *PSA obo Haschke v MEC for Agriculture and Others* [2004] 8 BLLR 822 (LC) par [16] at 826D-E.

[133] On the nature of the dispute Mr Rose-Innes pointed out that the parties were at arms length about whether or not the future of the market and abattoir had ever been a subject for bargaining in terms of the process agreement. Inasmuch as the agreement did not define "micro-designs" and the parties could not agree whether the market and abattoir fell under this description, this was not a simple matter of contractual interpretation, but a collective bargaining issue.

[134] Mr Rose-Innes emphasised that section 24(1) of the LRA provided that collective agreements should provide for a procedure to resolve any dispute about their interpretation or application. The parties were required to attempt to resolve the dispute through reconciliation, failing which it should be referred to arbitration. In the present matter clause 5.1 of the process agreement (par [117] above) stated unequivocally that any dispute relating to the interpretation or the

application of such agreement should be resolved by way of "expedited arbitration". The applicant in fact invoked this clause when it referred the matter to the bargaining council on 16 January 2004.

[135] Mr Rose-Innes submitted that this court does not have jurisdiction to adjudicate on any issue arising from the interpretation or application of the process agreement. This was stated clearly by Van Dijkhorst J in *Independent Municipal and Allied Trade Union v Northern Pretoria Metropolitan Substructure and Others* 1999 (2) SA 234 (T) at 238H-239A:

It is an inescapable characteristic of arbitration that (at least in first instance) it ousts the jurisdiction of a court of law to deal with that particular dispute. This is valid for the ordinary consensual contract. There is no reason why it should not be equally valid for a consensual contract (like a collective agreement) which includes the statutory requirement of a conciliation/arbitration clause laid down by s 24(1) of the Act. Where there is no such clause in the collective agreement s 24(2) equates that situation to the situation where there is one and s 24(4) and (5) lay down the same procedure in both cases. It follows, in my view, that also in the case where the collective agreement does not contain such clause but s 24(2), (4) and (5) require conciliation and then arbitration, it was intended that that was the sole route of dispute resolution.

See also *South African Motor Industry Employers Association and Another v National Union of Metalworkers of South Africa and Others* (1997) 18 ILJ 1301 (LAC) at 1304I-J; *FAWU v Premier Foods Industries Ltd (Epic Foods Division)* [1997] 6 BLLR 753 (LC) at 756F-757A; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* [1998] 10 BLLR 1014 (LC) par [13]-[16] at 1016I-1017E.

[136] This accords with the approach in *South African Municipal Workers Union v City of Cape Town* 2002 (4) SA 451 (CC) par [3] at 452H-J and *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) par [20] at 14E-G. In the recent case of *Dudley v City of Cape Town and Another* [2004] 7 BLLR 623 (CC) the Constitutional Court pointed out that labour courts are charged with the responsibility of overseeing the ongoing interpretation and application of labour laws and the development of labour jurisprudence.

[137] The fact that the applicant had already referred the dispute to arbitration indicated, Mr Rose-Innes submitted, that it had already made its election and could not request this court to adjudicate the same dispute. He accepted the authority of the *Fredericks* case (par [127] above) but pointed out that none of the exceptions provided for therein was present in the instant matter. In any event *Fredericks* was clearly distinguishable on the facts, no breach of the collective agreement in question having been alleged by the applicants. That case turned exclusively upon whether there had been breaches of their constitutional rights to equality and administrative justice (sections 9 and 33 of the Constitution).

[138] In the present matter, Mr Rose-Innes submitted, the applicant's cause of complaint had consistently been based on a breach of the process agreement. At no stage prior to argument had any breach of the applicant's constitutional rights been raised, be it by way of the administrative justice angle or otherwise. In any event, merely raising a constitutional point when the real issue is one of interpretation of an agreement would not, Mr Rose-Innes maintained, entitle the applicant to approach this court for relief. This court clearly had no jurisdiction to decide whether or not the first respondent had breached the collective agreement.
[139] Ancillary to this argument was that an alleged breach of the process agreement could not support a claim in terms of section 33 of the Constitution or PAJA, since such breach was not effected in the exercise of a public power and could not constitute an administrative act. Mr Rose-Innes relied in this regard on the following *dictum* in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) par [18] at 1023H-1014B (*per* Streicher JA):
The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of it being a public authority, find itself in a stronger position than the position it would have had been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution.

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See also the *Logbro Properties* case (par [94] above) par [10] at 467H-468A.

[140] Mr Rose-Innes made short shrift of the applicant's argument that the process agreement had been tacitly renewed after the initial extension, by express further agreement, of the prescribed time-frames. There simply was no such renewal by conduct and the process agreement became academic once the placement agreement had been negotiated and concluded on 7 May 2003 (par [26] above). In any event the market and abattoir were non-core functions falling under the directorate trading services. In the City's organisational structure they did not fall below the organisational level of a directorate and as such they did not qualify as micro-design functions. They would in fact have formed part of the macro-design and would have been headed by directors. The first respondent was nevertheless prepared to engage with the unions about the future of these services with a view to promoting sound industrial relations, and not because it regarded

the market and abattoir as micro-designs which fell to be dealt with in terms of the process agreement. This agreement lapsed on 14 November 2002 without the applicant's making representations on the micro-design proposals furnished by the first respondent, and without declaring any dispute before such cut-off date. Despite the expiry of the agreement the first respondent had nevertheless, as a matter of good industrial relations, been prepared to consult with the applicant in accordance with the principles set forth in such agreement.

[141] Finally Mr Rose-Innes submitted that, even if the process agreement had not lapsed and had indeed been applicable to the market and abattoir, the first respondent had not breached its obligations in terms thereof. It was indeed the applicant which had rendered consultation impossible by its intransigent resistance to the sale of these services.

***Consideration of the Respective Submissions***

[142] I propose to deal briefly with the various submissions set forth above. Interesting as Mr Brassey's arguments might have been, they were, generally speaking, not persuasive. In my view the applicant's reliance on sections 23 and 24 of the LRA are just further examples of its exceptionally woolly thinking. To suggest, for example, that it qualifies as a "worker" for purposes of section 23(2) is clearly a confused and confusing submission. What started off as an allegation of breach of contract entitling the applicant to have the decision to sell the market set aside, and in fact prompted the applicant itself to lodge arbitration proceedings, has been converted into an issue of administrative law. From there it has developed into a constitutional issue directed at protecting the applicant's right to fair labour practice. It is difficult to escape the conclusion that the applicant has sought to grasp at any straw, however tenuous, to find some basis for its attack on the sale of the market.

[143] It is true that a perusal of the papers does create the impression that the market and abattoir were regarded as micro- rather than macro-designs in the structural scheme of municipal services. It would further appear that the process agreement was in fact concluded with a view to negotiating the future of such services among all role players and stakeholders. Mr Rose-Innes fairly conceded that the first respondent had, despite the expiry of the agreement and despite the fact that it was not, according to the first respondent, applicable to the market and abattoir, nevertheless engaged the applicant with a view to maintaining good industrial relations. The problem, however, was that the applicant had no intention of making use of the opportunity to consult with or make representations to the first respondent regarding the sale of the market or abattoir. It availed itself of every means possible to avoid what the process agreement was designed for, namely to set afoot a consensual process of micro-designs in various phases, from preparatory, to design, to completion, to placement. Should *consensus* not be achieved because of interpretation or application problems, the dispute or disputes would, in terms of clause 5, be resolved by "expedited arbitration".

[144] It is, of course, quite correct that the applicant's attack on the sale of the market was not so much directed at exposing a breach of the process agreement as

at what the applicant regarded as a decision to privatise a municipal service. This was not an issue dealt with in the process agreement, however, and it could never have been envisaged that such an issue could arise within the context of interpretation or application of the agreement. It was certainly not the issue upon which the applicant based its reference to arbitration. Its attempt to change the character of the dispute from one concerning interpretation or application of the agreement to a constitutional dispute requiring adjudication by this court, smacks of egregious opportunism.

[145] I fully agree with Mr Rose-Innes that the present matter cannot be heard by this court as "any other matter" in terms of section 169(b) of the Constitution. An alleged breach of a collective agreement such as the process agreement cannot, in my view, be remotely characterised as a constitutional matter requiring the attention of this court. It cannot be regarded as "administrative action", as explained in the *Cape Metropolitan* case (par [139] above). The *Fredericks* case (par [127] above) is clearly distinguishable and inapplicable.

[146] It is probable that the process agreement did indeed lapse on 14 November 2002 when, as Mr Rose-Innes put it, "the final procedural milestone passed". I do not, however, believe that much turns upon this point since both the first respondent and applicant created the impression that they still regarded it as operative for purposes of finalising the discussion around the sale of the market and abattoir.

[147] The problem was, of course, that the applicant had little or no interest, in whatever capacity, to engage in discussions with the first respondent regarding what it saw as blatant privatisation of a municipal service. In view of these circumstances I doubt whether the applicant has made out a case of a breach by the first respondent of any of its obligations in terms of the process agreement. As submitted by Mr Rose-Innes in his alternative argument, the first respondent was at all relevant times prepared to engage with the applicant regarding the sale of the market and abattoir. It was the applicant, however, which demonstrated throughout a persistent recalcitrance in consulting with, or making representations to, the first respondent. It was hence itself in breach of the agreement, alternatively made it difficult, if not impossible, for the various phases envisaged therein to be finalised within the prescribed timeframes.

[148] In any event, there is no suggestion in the process agreement that a party's failure to comply with its obligations in terms thereof would have the effect that its actions or decisions would be nullified. That might have been the case had the cause of action been a reviewable irregularity, which it was clearly not.

[149] It follows that there is no merit in the argument that the first respondent was in breach of the process agreement.

**THE MAYORAL COMMITTEE'S ALLEGED LACK OF AUTHORITY**

[150] It is common cause that in October 2003 the first respondent adopted a set of delegations clarifying the powers of the executive mayor and the mayoral committee in respect of transactions such as the sale of the market. This gave

them the power to decide on any commercial activity with a value in excess of R5 million. As mentioned in the discussion of the background to the present application (par [37] above), the mayoral committee resolved, on 4 December 2003, to accept the second respondent as the preferred bidder for the market. Negotiations with a view to concluding a sale and lease agreement in respect thereof were to be set afoot immediately, subject thereto that the outcome of the negotiations were to be reported to the City Council for its "ratification and approval prior to acceptance". On 4 February 2004 the mayoral committee sanctioned the sale of the market to the second respondent and granted authority for the signing of the relevant sale and lease agreements (par [41] above). Despite the present proceedings being launched by the applicant on 26 February 2004, the City Council saw fit, on 28 May 2004, to ratify the mayoral committee's resolution of 4 February 2004 (par [44] above).

[151] The applicant rejected this resolution on the basis that the mayoral committee had purported to act on delegated authority. This was in conflict with section 59(1)(a) of the Systems Act (par [3] above) in that it involved the power to privatise a municipal service or entity. Only the City Council was vested with the required authority to make such a decision (par [53] above). The subsequent attempt by the City Council to ratify the resolution, the applicant averred, was out of time and of no effect (par [55] above).

[152] The first respondent's response to this attack, as mentioned before (par [58] above), was that the applicant had failed to exhaust its internal remedies, in terms of section 7(2)(a) of PAJA, by not making use of the appeal procedures provided for in section 62 of the Systems Act. The City Council's ratification of the mayoral committee's resolution did not preclude it from hearing an appeal or from convening a special committee to do so.

[153] On behalf of the applicant Mr Brassey argued that the decision to sell the market was invalid and reviewable under sections 6(2)(a)(i) and (ii) of PAJA and the principle of legality implicit in the Constitution. He submitted that the power to make a decision as to the sale of a municipal service could not be appropriately delegated in terms of section 59(1)(a) of the Systems Act. The reason was that such section explicitly excluded the power "to decide to enter into a service delivery agreement in terms of section 76(b)". If this power was excluded, he suggested, so much the more was the power to privatise a municipal service. In any event, he submitted further, the mayoral committee had divested itself of the

power to make such decision by resolving on 4 December 2003 that the outcome of the negotiations with the second respondent be reported to the City Council for its ratification and approval before acceptance thereof. It was empowered to do so in terms of section 61 of the Systems Act. Yet on 4 February 2004 it purported to exercise the very power it had given up two months earlier.

[154] Mr Rose-Innes submitted, on behalf of the first respondent, that the power to sell the market could appropriately be delegated in terms of section 59(1) of the Systems Act. There was nothing in the Act to justify the exclusion of such power. It was part of a system of delegation directed at maximising "administrative and operational efficiency", as stated in the introductory words of the said section. As for the applicant's argument that the mayoral committee had divested itself of its delegated power on 4 December 2003, Mr Rose-Innes submitted that this was in conflict with the evidence. The evidence had not been that the mayoral committee had, in the knowledge that it had the delegated power, deliberately decided not to exercise it but, instead, to refer the decision to the City Council. In any event, if the applicant was of the view that the mayoral committee had, on 4 February 2004, usurped the authority of the City Council, it should have taken the decision on appeal in terms of section 62 of the Systems Act.

[155] Section 59 of the Systems Act bears the heading "Delegations" and section 59(1)(a) thereof reads as follows:

A municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system, may –

(a) delegate appropriate powers, excluding a power mentioned in section 160(2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76(b) and to approve or amend the municipality's integrated development plan, to any of the municipality's other political structures, political office bearers, councillors or staff members …

Section 59(2)(e) provides that a delegation in terms of subsection (1):

(e) does not divest the council of the responsibility concerning the exercise of the power or the performance of the duty …

[156] Section 61 bears the heading "Referral of matters to delegating authorities for decision" and reads thus:

A political structure, political office bearer, councillor or staff member of a municipality to whom a delegating authority has delegated or sub-delegated a power to dispose of matters falling within the area of responsibility of that political structure, political office bearer, councillor or staff member may, or must if instructed to do so by the relevant delegating authority, refer a matter before the political structure, political office bearer, councillor or staff member to the relevant delegating authority for a decision.

[157] Section 62 provides for appeals against decisions of delegated authorities.

Section 62(1) reads:

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

[158] Section 6 of PAJA deals with the judicial review of administrative action, Section 6(1) entitles any person to institute proceedings in a court or tribunal for the judicial review of administrative action. The relevant portion of section 6(2), on which the applicant relies (par [153] above), reads thus:

A court or tribunal has the power to judicially review an administrative action if -
a) the administrator who took it -
   i) was not authorised to do so by the empowering provision;
   ii) acted under a delegation of power which was not authorised by the empowering provision; …

[159] Section 7 of PAJA contains a procedure for judicial review. Sections 7(2) (a) and (c) thereof read:

a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless an y internal remedy provided for in any other law has first been exhausted;
b) …
c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

[160] Once again the applicant is clutching at straws. The whole purpose of the system of delegation devised by sections 59 to 65 of the Systems Act is to increase, and indeed to maximise, the council's efficiency on an administrative and operational level. The primary matters which the council may not delegate are those specifically excluded by section 160(2) of the Constitution, namely the passing of by-laws, the approval of budgets, the imposition of rates, taxes, levies

and duties, and the raising of loans. The only other powers which it may not appropriately delegate are the power to set tariffs, the power "to decide to enter into a service delivery agreement in terms of section 76(b)" of the Systems Act, and the power to approve or amend the municipality's integrated development plan. Nowhere is it suggested that the power to dispose of an existing service, for whatever reason, falls outside the ambit of the powers which the council may appropriately delegate. By describing such disposal as an act of privatisation does not, and cannot, elevate it into any of the exceptions set forth in section 59(1)(a). The relevant decisions taken by the mayoral committee, which is clearly a political structure of the municipality, were hence not susceptible to review in terms of section 6(2) of PAJA.

[161] The suggestion that the mayoral committee divested itself of the power to sell the market is a peculiar one, to say the least. Quite clearly the committee was acting in terms of a delegated authority when it accepted the second respondent as the preferred buyer on 4 December 2004 and commenced negotiations forthwith with a view to concluding the relevant sale and lease agreement. Its decision to report back to the council on such negotiations for purposes of its ratification and approval was not required in terms of its delegated authority. This was not a case envisioned in section 61 of the Act (par [156] above) where the committee had deliberately taken the decision to divest itself of its delegated power and refer it back to the City Council for its decision. Even less was it a case of the City Council calling upon the committee to do so. At most, I believe, it was simply seeking the *imprimatur* of the council before finalising the matter. This would be in line with section 59(2)(e) of the Systems Act (par [155] above), namely that the City Council, as delegating authority, did not, in delegating the power in question, divest itself of the responsibility to ensure that the relevant power was exercised or duty performed.

[162] This was clearly the intention of the mayoral committee when it sanctioned the sale and lease on 4 February 2004. It felt comfortable in doing so since it knew that the City Council was in favour of the decision and had given its blessing to the finalisation of the process. The City Council's ratification of the decision on 28 May 2004 was quite unnecessary and appears to have been intended as nothing more than an approval of the mayoral committee's decision *ex post facto* and *ex abundanti cautela*. There is hence no merit in the applicant's suggestion that the ratification was out of time and that the decision to sell the market was invalid.

[163] It follows that I am satisfied that the mayoral committee was, at all

relevant times, fully authorised and empowered to dispose of the market to the second respondent and that the City Council was not required to approve or ratify it. Section 6(2) of PAJA (par [158] above) hence never came into play. As correctly submitted, however, by Mr Rose-Innes and Mr Duminy on behalf of the first and second respondents respectively, section 7(2)(a) of PAJA (par [159] above) did come into operation inasmuch as the applicant failed to exhaust an internal remedy. I speak here of its right of appeal as contained in section 62 of the Systems Act (par [157] above), before approaching this court for relief on review. There was no suggestion that exceptional circumstances, as provided for in section 7(2)(c), justified any exemption from such obligation.

**THE FIRST RESPONDENT'S ALLEGED BAD FAITH**

[164] I shall deal with this argument briefly, simply because there is not the slightest merit in it. On the contrary, the allegations of bad faith are, in my view, quite unjustified and border on the vexatious. The first respondent and its representatives were exceedingly tolerant with the applicant's implacable and frequently aggressive resistance to the perfectly rational decision of disposing of the market and abattoir and eventually selling the market to the second respondent as a going concern. Mere allegations of bad faith can never create, or justify accusations of, bad faith. And that is exactly what the applicant has sought to do (see, for example, paragraphs [18], [20] and [21] above). No factual basis for these allegations appears from the papers filed on its behalf.

**RELIEF SOUGHT BY THE PARTIES**

[165] It is abundantly clear that the applicant has made out no case for any relief at all, let alone interim relief regarding the sale of the abattoir as sought in the notice of motion. That has fallen away in view of the first respondent's undertaking not to proceed with the sale of the abattoir pending finalisation of the present matter (par [1] above). In any event I fully agree with Mr Rose-Innes that there is no threat of irreparable harm to the applicant in respect of the disposal of the abattoir. Any prejudice it may suffer is merely hypothetical. Any balance of convenience in the present matter would overwhelmingly favour the first respondent, which would suffer huge prejudice should an interdict be granted.
[166] In this regard, as submitted by Mr Duminy, although the second respondent was not an immediate party to the dispute between the applicant and first respondent, the second respondent, its many employees and any number of third parties would patently suffer substantial prejudice should an interim interdict be granted. It might even have the effect that the market service rendered by the second respondent could collapse, causing an irremediable and unquantifiable loss to all the said role players and stakeholders. I fully agree with Mr Duminy that these are considerations which cannot be ignored in considering interim relief such as that sought by the applicant in the present matter. There is clearly no basis on which this court could consider granting such relief.
[167] I have carefully considered the first respondent's striking out application and am quite satisfied that it was fully justified. Many of the objectionable

paragraphs and allegations constituted new matter appearing for the first time in the applicant's replying and supplementary affidavits, or were irrelevant, repetitive and argumentative, if not out and out vexatious.

[168] Mr Rose-Innes requested that the application be dismissed with costs, including the reserved costs of the hearing on 27 February 2004, 27 May 2004 and 31 May 2004. He also sought that the costs of three counsel be allowed in a matter of this magnitude. There does not appear to have been any opposition to reserved costs following the costs of the application. I do not, however, believe that the employment of three counsel by the first respondent was justified, particularly in view of the extent to which the original issues became limited during the course of the proceedings (par [3] and [4] above).

**CONCLUSION**

[169] In the event I would make the following order:

1. The application as against the first and second respondents is dismissed with costs, including the costs of the hearing on 27 February 2004, 27 May 2004 and 31 May 2004, and including the costs of two counsel where two counsel were employed.

2. The first respondent's application to strike out is granted with costs.

**D H VAN ZYL**
Judge of the High Court

I agree.

**A M MOTALA**
Judge of the High Court