IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: _____

In the matter between:

GIANT CONCERTS CC	Applicant
and	
RINALDO INVESTMENTS (PTY) LTD	FirstRespondent
THE MINISTER FOR LOCAL GOVERNMENT, HOUSING AND TRADITIONAL AFFAIRS FOR THE PROVINCE OF KWAZULU-NATAL	Second Respondent
ETHEKWINI MUNICIPALITY	Third Respondent
THE MINISTER OF PUBLIC WORKS	Fourth Respondent
THE MINISTER OF DEFENCE	Fifth Respondent

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

KARAMCHAND MODILAL GAYADIN

do hereby make oath and state:

1 I am an adult male businessman.

2 The facts deposed to herein fall within my personal knowledge, unless otherwise indicated.

3 I am duly authorised to depose to this affidavit on behalf of the Applicant.

THE PARTIES

4 The applicant is **GIANT CONCERTSCC**, ("Giant Concerts") a close corporation duly incorporated in terms of the laws of South Africa, having its registered address at 45 Executive Drive, Orient Heights, Pietermaritzburg, 3201.

4.1 Giant Concerts' registered address is in Pietermaritzburg.

4.2 However, its primary place of business is in Durban, at48 Windsor Avenue, Umhlanga Ridge, Umhlanga Rocks, Durban.

4.3 From 2003 until approximately 2006, Giant Concerts' primary place of business was at Unit 13, Somerset Gardens, 1 Somerset Drive, Umhlanga, Durban.

5 The first respondent is **RINALDO INVESTMENTS (PTY) LTD** ("Rinaldo").

5.1 Rinaldo's registered address is at 3rd Floor, Corporate Place, 9 Gardiner Street, Durban, 4001.

5.2 Rinaldo is the property holding entity of Videovision (Pty) Ltd.

5.3 Rinaldo was the successful appellant in the Supreme Court of Appeal.

6 The second respondent is the **MINISTER FOR LOCAL GOVERNMENT, HOUSING AND TRADITIONAL AFFAIRS FOR THE PROVINCE OF KWAZULU-NATAL** ("MEC" or "Local Government Minister"), having her address at 14th Floor, Natalia, Longmarket Street, Pietermaritzburg, KwaZulu-Natal. The MEC is cited because of her role in the decision sought to be reviewed and for any interest she may have in the relief sought.

7 The third respondent is the **ETHEKWINI MUNICIPALITY** ("eThekwini").

7.1 eThekwini's address is at City Hall, West Street, Durban.

7.2 Ethekwini took the decision to sell the land to Rinaldo which Giant Concerts successfully reviewed in the High Court.

8 The fourth respondent is the **MINISTER OF PUBLIC WORKS.**

8.1 The Minister of Public Works is cited care of the State Attorney (KwaZulu-Natal), 3rd Floor, Sangro House, 417 Smith Street.

8.2 The Minister is cited for any interest he may have in the relief sought.

9 The fifth respondent is the **MINISTER OF DEFENCE.**

9.1 The Minister of Defence is cited care of the State Attorney (KwaZulu-Natal), 3rd Floor, Sangro House, 417 Smith Street.

9.2 The Minister is cited for any interest he may have in the relief sought.

10 In the SCA, only Rinaldo prosecuted the appeal. All of the other state respondents abided the decision of the High Court.

OVERVIEW OF THIS APPLICATION

11 This is an application for leave to appeal against a judgment of the Supreme Court of Appeal. At its core is the legality of a contract of sale of land. eThekwini purported to sell the land to Rinaldo by private bargain for a price substantially lower than its market value. The sale was for an amount of R15 million. The value of the property was R71 million.

12 Despite the fact that Giant Concerts had objected to the proposed sale of the land to Rinaldo, and was given an oral hearing to explain the basis of its objection to the sale by the officials of eThekwini, the SCA ruled that it lacked standing to challenge the lawfulness of the sale because it was not a ratepayer of the eThekwini municipality.

13 This appeal focuses on two questions:

13.1 First, whether the fact that Giant Concerts' registered place of business is in Pietermaritzburg and not eThekwini deprives it of standing to challenge the sale of land to Rinaldo by eThekwini.

13.2 Second, whether the sale of the land by eThekwini to Rinaldo by private bargain was lawful in the light of the Constitution and applicable legislation.

14 The first issue turns on the interpretation of legislation in conformity with the Constitution. I am advised that this is always a constitutional issue.

***S v Shaik and Others* 2008 (2) SA 205 (CC) at para 83**

I submit that the interpretation adopted by the SCA is inconsistent with sections 217, 195, 33, 34 of the Constitution as well as the right of political participation. I expand on these arguments at paragraphs 49 to 56 of this affidavit.

15 The second issue is whether an organ of state exercised its statutory powers in a fashion that was lawful and consistent with the Constitution. I submit that this too is a constitutional issue. Giant Concerts submits that the contract of sale purportedly entered into between eThekwini and Rinaldo was unlawful for the following reasons, which are expanded on at paragraphs 66 to 71 of this affidavit:

15.1 The sale was ultra vires the empowering legislation because the property was not owned by eThekwini, nor was it freely alienable at the time of the sale.

15.2 The sale was subject to suspensive conditions which were not complied with.

15.3 The sale was purportedly approved by the Acting MEC for Local Government who had no authority to do so.

15.4 The sale was not properly advertised as required.

15.5 The authorities did not observe the requirements of procedural fairness in purporting to effect the sale.

15.6 The decision to dispose of the property was unreasonable in the circumstances.

16 This is an application for leave to appeal against the judgment of the Supreme Court of Appeal in the matter of Rinaldo Investments (Pty) Ltd v Giant Concerts CC and Others, delivered on 29 March 2012 ("the SCA judgment"). A copy of the SCA judgment is attached as **Annexure "1"**.

17 The SCA overturned a judgment of KwaZulu-Natal High Court, Pietermaritzburg ("the High Court judgment"). A copy of the High Court judgment is attached as **Annexure "2"**. The High Court set aside the

agreement of sale and the decisions taken by various bodies of eThekwini which led to the sale.

18 Giant Concerts contends that the SCA judgment is flawed in the following respects:

18.1 It adopts an unduly restrictive approach to standing. The SCA failed to recognise that the Constitution requires a broader approach to standing in cases involving the alienation of land by organs of state.

18.2 It fails to recognise that the applicable legislation must be understood as law that gives effect to section 217 of the Constitution. It must therefore be interpreted to establish a system for the alienation of municipal land that is fair, equitable, transparent, competitive, and cost-effective. An interpretation of the legislation according to which only rate-payers of eThekwini have standing to challenge decisions of eThekwini to alienate land undermines the competitiveness and fairness of the municipal system for the alienation of land.

18.3 It fails to recognise that Giant Concerts had expressed an interest in purchasing the land for a better price, and therefore at a rate closer to the land's market value. Giant Concerts had objected to the sale of the land in a non-competitive, closed transaction to Rinaldo. As such, Giant Concerts plainly had an interest in the

fairness and legality of the proposed transaction. The SCA erred in finding that Giant Concerts lacked standing to review the contract of sale.

18.4 It interprets the applicable requirements for a sale by private bargain so that they only permit objections by ratepayers of the municipality which proposes to make the sale. This fails to give appropriate weight to the fact that permitting objections and proposals from interested parties who are not ratepayers would result in a more competitive process, would give the municipality a wider range of options, and is therefore in the best interests of the municipality. It also gives better effect to section 217 of the Constitution.

18.5 It found that a non-ratepayer could not have an interest in the social and economic development of eThekwini and thatGiant Concerts' involvement in the notice and comment procedure leading to the sale was therefore purely self interested. This interpretation ignores the fact that a competitive and open notice and comment procedure is in the best interests of the municipality, and accords with the requirements of section 217 of the Constitution. It also failed to recognise the fact that, despite having its registered address in Pietermaritzburg, Giant Concerts' primary place of business has at all relevant times been in eThekwini.

18.6 It fails to give sufficient weight to the constitutional values of transparency and accountability in public administration.

19 In the remainder of this affidavit, I deal with the following issues in turn:

19.1 The background to the application;

19.2 The judgment of the High Court;

19.3 The judgment of the Supreme Court of Appeal;

19.4 The constitutional complaints regarding the SCA judgment; and

19.5 Prospects of success and the interests of justice.

BACKGROUND

20 At some stage before March 2003, eThekwini received a proposal from Videovision Entertainment (Pty) Ltd ("Videovision") to acquire property situated on the Durban beachfront for the purpose of establishing a film studio in Durban.

21 In March 2003, eThekwini's real estate department recommended to its executive committee that Videovision's proposal be supported.

22 During June 2003, Videovision made formal submissions to eThekwini to acquire the properties. Thereafter, on 24 November 2003, eThekwini's real estate committee prepared a further report for its executive committee. It

recommended that the executive committee approve the sale of the properties to Videovision by private treaty at a price of R15 million. The land had been valued during the negotiations at R71 million. The purchase price therefore represented approximately 21% of the open market valuation.

23 A day later, eThekwini's executive committee accepted the recommendations to approve the sale.

24 On 12 December 2003, an advertisement was published for the ostensible purpose of complying with the provisions of Section 234 of the Local Authorities Ordinance 25 of 1974 ("the Ordinance"). On the same day, a written agreement of sale was concluded between eThekwini and Rinaldo in respect of the properties. The agreement was available for inspection only in English, and not also in Afrikaans as was required.

25 On 29 December 2003, Giant Concerts and one other person objected to the proposed sale. Giant Concerts' objection was to the effect that it wished to make an alternative offer for the same property, to develop it for the same purpose, and that its offer would be higher than that made by Rinaldo. The effect of the sale by private treaty was that Giant Concerts was precluded from making any offer for the land at all.

25.1 I attach a copy of Giant Concerts' letter to eThekwini's City Manager of 29 December 2003 as **Annexure "3"**. It is notable that

the letterhead clearly shows that Giant Concerts' postal address was in eThekwini, and that its phone number was a Durban number.

25.2 I also attach the eThekwini real estate department's letter of 11 February 2004 as **Annexure "4"**. It was sent to Giant Concerts and received by Giant Concerts at its Durban address. This letter formed part of the record before the SCA.

25.3 I submit that it is therefore surprising that the SCA found that Giant Concerts had no right to object to the sale by eThekwini and that it had no interest in the sale of land by eThekwini. It is clear that Giant Concerts' conducted its business from eThekwini. eThekwini was its primary place of business, notwithstanding the fact that its registered address was in Pietermaritzburg.

26 On 15 January 2004, a meeting was held to consider the objections.

27 On 27 January 2004, eThekwini's real estate department prepared a report to its executive committee concerning the objections received.The report recommended that the executive committee's decision of 25 November 2003 be reaffirmed, notwithstanding the objections.

28 On 11 February 2004, eThekwini directed a letter to Giant Concerts in relation to its objection. EThekwini advised Giant Concerts that "**a report**

has been submitted to the Council detailing the objections and I shall advise you further thereon in due course".

28.1 eThekwini did not disclose to Giant Concerts that its real estate department had at that stage already recommended to its executive committee that the objections should be rejected and that its earlier (November 2003) decision be reaffirmed.

28.2 It is also clear eThekwini's real estate department undertook to advise Giant Concerts of the outcome of the objections and the Council's decision thereon.

29 On the same day (11 February 2004), eThekwini wrote to Rinaldo's attorneys and advised them that **"the matter is presently awaiting the Council re-affirmation of sale and if approved submission to the Premier of KwaZulu-Natal for consent"**.

29.1 It is clear from this letter that eThekwini's real estate department disclosed to Rinaldo's attorneys that a re-affirmation of the earlier decision had been sought from its council and, by implication, that the objection of Giant Concerts had been rejected. Hence what was disclosed to Rinaldo concerning the objections was not disclosed to Giant Concerts.

30 On 23 February 2004, eThekwini received a written offer for the properties for R 36.8 million from one Mr E Joosab. There is no evidence that this was responded to or evaluated.

31 On 26 February 2004, eThekwini's council accepted the recommendations of its real estate department. It approved the sale, subject to the consent of the Premier. On 10 March 2004, eThekwini applied to the Premier for his consent to the sale.

32 Giant Concerts was not informed by eThekwini of the outcome of its objection, nor, specifically, of the rejection thereof; of the real estate department's recommendation to the council; of the reasons for the rejection; or of the council's decision to approve the sale or the application to the Premier.

33 Giant Concerts subsequently learned informally that the sale had been referred to the Premier for his approval. Its attorneys thereafter wrote directly to the Premier requesting an opportunity to make representations against the approval and the opportunity to advance a substantive proposal relating the site. The Premier did not afford Giant Concerts the opportunity to make these representations.

34 During July 2004, the Head of the Department of Local Government, Housing and Traditional Affairs prepared a memorandum for the MEC, for the purposes of considering the application for approval. The

memorandum identified the following material considerations (amongst others):

34.1 "**Only in exceptional cases may a Municipality sell by private bargain**".

34.2 "**The application to sell the Natal Command Site by private bargain appears, with respect, to be contrary to the Municipality's policy**".

34.3 eThekwini would be required to fund the relocation costs of the Defence Force in the sum of approximately R5.4m. "**This in effect means that the net sale of the property (excluding any possible claw back amounts) reduces the sale price of the property from R 15 million to R9,541,320.00**"

35 During August 2004, the late MEC Makhaye wrote to eThekwini's Mayor expressing grave concern about a sale by private treaty, as opposed to by public competition.

36 On 9 September 2004, the Acting MEC wrote to the head of department advising that he had approved the sale, subject to certain (seven) conditions. On 13 September 2004, the acting head of department wrote to eThekwini advising of the MEC's (conditional) approval of the application.

37 On 17 September 2004, the head of department wrote to Giant Concerts advising that eThekwini had in fact made an application to the Premier for approval and that the approval had been granted by the MEC. On 20 September 2004, Giant Concerts requested copies of all of the documents relating to the MEC's approval of the sale. These were never provided.

38 On 22 October 2004, the MEC furnished an amended written approval to eThekwini which deleted two of the previous conditions.

39 On 22 February 2005, the Acting MEC wrote to eThekwini confirming that the conditions required by him had been incorporated into an addendum to the agreement. The Acting MEC also required written confirmation that eThekwini had satisfied itself that no payment into the Public Improvement Fund would be occasioned by the sale. There is no evidence that such written confirmation was ever furnished by eThekwini.

40 Giant Concerts instituted review proceedings before the High Court on 3 May 2005.

JUDGMENT OF THE HIGH COURT

41 The KwaZulu-Natal High Court, Pietermaritzburg declared the agreement of sale purportedly concluded between eThekwini and Rinaldo null and void. It reviewed and set aside the decisions of eThekwini which had led to the agreement.

42 In the High Court, Rinaldo raised the issue of Giant Concerts' standing. The High Court rejected the argument that Giant Concerts lacked standing to review the contract. It found that:

42.1 The key purpose of the applicable Ordinance is to provide opportunities to members of the public to participate in decisions about the disposal of public assets (para 22).

42.2 Once the right to object has been granted, and an adverse decision is made against the objector, the objector is entitled to approach a court for appropriate relief (para 22).

42.3 Giant Concerts had demonstrated a sufficient legal interest in the outcome of the proceedings to confer standing on it (para 22).

43 On the merits, the High Court found that the conclusion of the contract was fatally flawed for the following reasons:

43.1 eThekwini was not entitled to dispose of the property in terms of the applicable Ordinance, because the property was not "**freely alienable**" (para 52).

43.2 The purported contract of sale was procedurally unfair and invalid because the sale agreement had been concluded before eThekwini gave public notice of its intention to sell or considered any objections. This showed that eThekwini did not consider objections with an open mind, if at all (para 58).

43.3 eThekwini did not deal with the process and comments even-handedly, but instead "**gave preference to**" Rinaldo. eThekwini"**adopted a one-dimensional approach in favour of**" Rinaldo. This rendered the process procedurally unfair (paras 67 and 76).

JUDGMENT OF THE SCA

44 The SCA overturned the judgment of the High Court. It found that Giant Concerts lacked standing to bring the review. It reasoned as follows:

44.1 Giant Concerts claimed to act only in its own interest (para 13).

44.2 Giant Concerts' registered address is in Pietermaritzburg. It therefore doesnot have rate-payer status in eThekwini (para 13).

44.3 Sections 233, 234 and 235 of the Ordinance are designed to protect the interests of the local community only (paras 25-26).

44.4 Only those persons who have an interest in the interests of the borough may object to a sale by private bargain (para 29).

44.5 Giant Concerts has no interest in the interests of the borough, and therefore did not have the right to object to the sale or to review the decision to enter into the contract (para 30).

THE APPLICANT'S CONSTITUTIONAL COMPLAINTS

45 The SCA found that Giant Concerts lacks standing to challenge the decision of eThekwini because it is not an eThekwini ratepayer.

46 I respectfully submit that this interpretation is unnecessarily restrictive in its approach to standing, and at odds with the purpose and intent of the legislation properly interpreted in the light of the Constitution.

Theconstitutionally required interpretation of the applicable legislation

47 I am advised that the Ordinance must be interpreted in the light of the Constitution. Courts are bound to interpret statutes, including pre-Constitutionally enacted statutes, in such a way that they maximise the values of the Constitution.

48 I submit that the SCA's interpretation of the Ordinance is inconsistent with at least five provisions of the Constitution.

49 First, it is inconsistent with section 217 of the Constitution. Section 217 of the Constitution provides:

> *"When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do*

so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

49.1 I submit that section 217 of the Constitution applies to transactions in which an organ of state contracts for the sale of land. It follows that the Ordinance should be interpreted as part of the legislative system giving effect to section 217 of the Constitution.

49.2 Section 217 makes competitiveness a necessary component of state tendering processes. This is because competitive processes ensure that the state obtains the best possible value when it enters into contracts, including contracts in which it alienates immovable property.

49.3 The sale of assets by an organ of state must be implemented in accordance with a system designed to maximise public benefit. For this reason, there is a presumption in favour of open and competitive auctions, and the sale of assets at market-related prices.

49.4 The language of the Ordinance is plainly susceptible of such an interpretation. Section 233(8) of the Ordinance provides:

"Notwithstanding anything contained in subsection (2), the council may sell or lease any immovable property by private bargain <u>if the council is satisfied that the interests of the borough will be better served than by sale or lease by public auction or public tender</u>, or that other circumstances connected with the proposed transaction, justify such a course."

49.5 I submit that it follows from the language of the Ordinance read in the light of section 217 of the Constitution that sale by private bargain is only permissible where that arrangement would produce greater benefits for the relevant organ of state than a public auction.

49.6 Stripping non-ratepayers of the right to object to sales by private treaty will not lead to greater benefits for municipalities seeking to alienate land. On the contrary, it will exclude competition and make it more likely that land is alienated for sub-optimal prices, and to the benefit of purchasers at the expense of the borough.

50 Second, the interpretation of the SCA is inconsistent with section 195 of the Constitution. Section 195 of the Constitution enshrines the accountability and transparency as basic values governing public administration.

50.1 The SCA's interpretation of the Ordinance undermines the values of openness and transparency by making it permissible for municipalities to ignore objections which may be valid. By shrinking the pool of citizens who can validly object to a sale by private treaty, the interpretation of the SCA reduces the obligations on municipalities to account for such decisions in the light of all of the relevant facts and circumstances.

50.2 The SCA's interpretation also limitsthe accountability of municipalities that decide to sell property by private treaty. It reduces the number of participants who may approach the courts with complaints regarding the lawfulness of the process. On the SCA's approach to standing, municipalities may only be held accountable by participants who also happen to be ratepayers. All other participants are precluded from approaching the courts for relief, even if the process was patently unfair and unlawful.

51 Third, the interpretation of the SCA is inconsistent with the right of just administrative action.

51.1 I submit that the disposal by an organ of state of property rights constitutes administrative action. The constitutional right to just administrative action enshrined in section 33 of the Constitution and given effect to by the Promotion of Administrative Justice Act 3 of 2000 is detrimentally affected by the interpretation of the SCA, because it strips an affected party of the right to secure redress for administrative unfairness when it participates in the sale of land by private treaty.

51.2 The approach of the SCA deprives Giant Concerts of standing to vindicate its right to fair just action. It therefore countenances and tolerates unlawful, unreasonable and procedurally unfair conduct on the part of eThekwini in respect of Giant Concerts.

51.3 The effect of this is that a procedurally flawed and otherwise unlawful decision is allowed to stand despite attempts by one of the participants to seek relief from the courts.

52 Fourth, it is inconsistent with the right of access to court enshrined in section 34 of the Constitution.

52.1 The interpretation of the SCA deprives Giant Concerts of the right to approach a court for relief in respect of the sale of the land to Rinaldo, no matter how improper or unfair the process followed by eThekwini was.

52.2 This is inconsistent with this Court's finding that the Constitution requires a "**broad approach to standing**".

***Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 165**

52.3 This Court has found that the right of access to court is foundational to the stability of an orderly society, and that powerful considerations are required to justify its limitation.

***Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) at para 22**

52.4 I submit that the SCA's finding that Giant Concerts lacks standing in this matter unnecessarily deprives giant Concerts of the right to have its complaint about the procedure leading to the sale adjudicated.

53 Fifth, it is inconsistent with the right of political participation, enshrined in the Preamble and sections 1, 16 and 19 of the Constitution.

53.1 This Court has recognised that "**the right to political participation is a fundamental human right**".

53.2 The right to political participation also encompasses the opportunity "**to take part in the conduct of public affairs.**"

***Doctors For Life International V Speaker Of The National Assembly And Others* 2006 (6) SA 416 (CC) at paras 90-92**

53.3 I submit that Giant Concerts' participation in the process leading to the sale of the property constituted an exercise of its right to political participation, and that the decision of the SCA undermines this right by:

53.3.1 Precluding it from objecting to a sale of land by eThekwini on the basis that it is not an eThekwini ratepayer; and

53.3.2 depriving it of standing to challenge the decision in court.

54 I submit that the Ordinance should be interpreted to confer a right of objection on any interested party who has sought to participate in the process, regardless of whether they are rate-payers of the relevant municipality, and that any party who has such a right must have standing to challenge the legality of the proceedings in which it objected.

55 It is not plausible to interpret the Ordinances as conferring the right to object and challenge municipal decisions to alienate land only on ratepayers of the municipality in question. Such an interpretation manifestly fails to ensure that the sale of public assets is subject to a system designed to maximise public benefit from such sales. It precludes interested parties from outside the municipality participating in the process leading to the sale and from making better offers. It also prevents such interested non-ratepayers from holding the municipality accountable after the event by stripping them of legal standing.

56 The following hypothetical examples demonstrate the point:

56.1 The City of Cape Town wishes to sell land to be used for a particular kind of industry. It decides not to adopt a competitive tender process but to sell the land by private treaty instead. AJohannesburg-based company wishes to make an offer for the land, and therefore objects to the proposal to sell the land by private treaty. It is clear that Cape Town's best interests will be best served by receiving the objection of the Johannesburg-based company and considering its proposal. It is possible that the Johannesburg-based company may submit a proposal which will be of much greater benefit to the City of Cape Town and its residents than any which is submitted by a Cape Town-based company. But if only Cape Town-based companies are permitted to participate in the process, Cape Town will never consider any

other proposals. I submit that this is plainly not in the best interests of the City of Cape Town. Yet this is the consequence of the SCA's judgment.

56.2 In a small municipality with fewer rate-payers, the effects of this interpretation will be especially iniquitous. The effect of allowing only ratepayers to participate in the process leading to the alienation of land by private treaty ensures that such sales are restricted to a very small pool of possible purchasers. In some instances there may be only a single purchaser capable of making an offer for the land, or there may be none. This creates the opportunity for collusion between powerful rate-payers and the municipality to dispose of public assets at prices substantially lower than those that could be obtained as a result of a competitive and open process. Again, the anti-competitive consequences of such a system are manifest, and are plainly not in the best interests of the municipality or the public interest.

The SCA failed to recognise Giant Concerts' real and substantial interest

57 Giant Concerts objected to the sale by private treaty because it wished to submit an offer to purchase the same land. It sought the opportunity to make a proposal to eThekwini for the purchase of the land.

58 The refusal to consider any such proposal plainly impacted directly on Giant Concerts' interests. It was deprived of the opportunity to make a proposal which, if accepted, would have benefitted it greatly. I submit that the loss of the opportunity to submit a proposal constitutes a legally protectable interest.

59 There are three independent bases on which Giant Concerts has standing:

59.1 First, the Ordinance conferred on Giant Concerts the right to object, which it invoked. The decisions and actions of eThekwini and the MEC constituted administrative action and Giant Concerts was entitled to a lawful and procedurally fair process and outcome. Where these rights are extended by law, a party necessary has a sufficient interest to pursue review relief.

> ***Logbro Properties v Bedderson NO and Others*** **2003 (2) SA 460 (SCA) at 465 para 5;** ***See also: Municipal Manager: Qaukeni Local Municipality and Another v F V General Trading CC*** **2010 (1) SA 356 (SCA) para 14 and at common law*, Jacobs v Waks*1992 (1) SA 521 (A)**

59.2 Second, the principle of legality means that any unlawful decision is liable to be set aside whether or not it infringed the rights of Giant Concerts.

> ***Minister of Public Works and others v Kyalami Ridge Environmental Association and another (Makhwevho intervening)*** **2001 (3) SA 1151 (CC) at para 54**

59.3 Third, Giant Concerts' interest must be assessed in the light of section 217 of the Constitution. For the reasons already provided, section 217 requires the alienation of land to be carried out in accordance with a competitive, fair, equitable and transparent system. I submit that any system that deprives some objectors of the necessary standing to challenge unfair decisions cannot be competitive, fair, equitable or transparent.

60 All of the parties to the proceedings accepted that Giant Concerts validly objected. They contended, however, that Giant's objection was properly considered and rejected. Had Giant Concerts not had an interest in the first place, its objection would not have been entertained or would have been rejected on the basis of an absence of interest.

61 I respectfully submit that Giant Concerts plainly had a sufficient interest in the procedural fairness and legality of the process that followed.

Merits

62 Because it found that Giant Concerts lacked standing, the SCA declined to make any findings about the legality of the process followed by eThekwini in entering into the contract of sale with Rinaldo.

63 I respectfully submit that the SCA erred in this regard. There is a reasonable prospect that this Court will find that Giant Concerts has the requisite standing to challenge the contract of sale.

64 The effect of the SCA's approach to standing is to leave intact an unlawful decision on the ground that Giant Concerts does not have standing to review it. This approach is constitutionally unsustainable:

64.1 It is inconsistent with the principle of legality, which requires invalid administrative action to be declared unlawful.

***Bengwenyama Minerals (Pty) Ltd And Others V Genorah Resources (Pty) Ltd And Others* 2011 (4) SA 113 (CC) at para 84**

64.2 It is inconsistent with the right of just administrative action.

64.3 It is inconsistent with section 217 of the Constitution, which requires tender processes to be fair, equitable, transparent, and competitive.

65 In addition, there are good prospects that this Court will uphold the findings of the High Court and set aside the contract of sale. I submit that the decisions leading to the sale and the conclusion of the contract were fatally flawed. Giant Concerts contends that the contract of sale falls to be set aside on six grounds.

66 First, the sale was ultra vires section 233 of the Ordinance because the property was not owned by the Council, nor was it freely alienable as required.

66.1 The sale was in terms of section 233(8) of the Ordinance.

66.2 Section 233(1) of the Ordinance provides:

> *"The expression 'immovable property' as used in this section and in sections 234 to 239 (inclusive) means immovable property of the council which is freely alienable and includes any right, interest or servitude therein or there over." (emphasis added).*

66.3 There are two elements that are critical. First, the immovable property must be the "**property of the council**". This plainly means that the council must own the property.Second, it must be "**freely alienable**". This plainly means that there must be no restriction on the transfer of the property. These requirements must exist at the time that the council resolves to sell the property.

66.4 I submit that these are jurisdictional prerequisites for a lawful disposal of immovable property by a municipality under the Ordinance.

66.5 The evidence before the High Court demonstrated that neither of the jurisdictional facts were present:

66.5.1 Certain material portions of the properties were not owned by eThekwini. They were owned by the State.

66.5.2 There were restrictions on the transfer of certain portions of the properties which rendered them not "**freely alienable**." The restriction was that the properties would remain in the ownership of the State until they were no longer used or required for defence purposes.The clear evidence before the High Court was that the properties were being used for defence purposes.

66.6 The consequence is that the sale and the decisions taken by the eThekwini and the MEC were predicated on a material error of law and not authorised by the provisions of the Ordinance. The MEC and eThekwini simply had no power to dispose of State land. As such, they acted unlawfully and their decision to dispose of the property to Rinaldo is invalid. Moreover, the disposal of State land is also subject to the State Land Disposal Act 48 of 1961. As pointed out in LAWSA, Vol 24 (first re-issue), Land, at paras 41-42 such disposal

66.6.1 is in general at market value and on a competitive basis; and

66.6.2 is at the instance of the President or his or her assignee.

67 Second, the sale was subject, *inter alia*, to two suspensive conditions, both of which failed.

67.1 The sale agreement was subject to certain suspensive conditions which were required to be satisfied "**as soon as is reasonably possible after signature of**" the written agreement.Signature was on 12 December 2003.

67.2 The two most material suspensive conditions were that:

67.2.1 eThekwini would acquire the portions of the properties owned by the State in order to sell the same to Rinaldo.

67.2.2 The properties would be re-zoned to a special zone for film studios and related activities.

67.3 The first suspensive condition was not satisfied on the date that the application was instituted (5 May 2005) or at the stage that the application was heard (12 June 2009).

67.4 On eThekwini's own version, a reasonable time would have elapsed six months after it wrote to the Department of Public Works during February 2007, which would have been August 2007. In that letter, eThekwini specifically recorded that if an agreement to acquire the properties from the State was not concluded within six months of 2 February 2007, "**the Municipality will have no alternative but to cease all further negotiations in this matter"** and this could result "**in the Agreement of Purchase and Sale entered into with Rinaldo Investments (Pty) Ltd lapsing due to the Municipality being**

unable to fulfil the suspensive condition relating to the acquisition of the site".

67.5 As to the second suspensive condition, no evidence was advanced by eThekwini or Rinaldo concerning the successful rezoning of the properties. This was likely due to the failure of eThekwini to acquire the portions of the property owned by the State.

67.6 Section 233(12) of the Ordinance stipulates that the upper limit for the validity of a decision to authorise a sale by private treaty is two years after the MEC has approved the sale. If a period of two years elapses then the council must resolve for the sale to continue after complying with the provisions of section 234.

67.7 In the present matter the Acting MEC approved the sale (subject to conditions) during September 2004. On 22 October 2004, the Acting MEC furnished an amended approval removing two of the conditions. On 22 February 2005, the MEC confirmed to eThekwini by way of letter that the conditions had been incorporated into the addendum to the sale agreement. This letter also stated that the Municipality was required to obtain written confirmation that it had satisfied itself that no payment to the Public Improvement Fund was necessary. The 22 February 2005 letter is the last word on the MEC's approval.

67.8 In terms of section 233(12)(b) of the Ordinance, the validity of eThekwini's decision to approve the sale would thus have lapsed two year's later, during February 2007. Even if some additional time after 22 February 2005 is allowed, the fact is that approximately 4 years had elapsed (when the application was heard) since the MEC's last active approval.

67.9 It follows that the agreement of sale is invalid either by operation of law or by reason of the failure of the suspensive conditions.

68 Third, the sale was purportedly approved by the acting MEC for Local Government who had no delegated authority from the Premier to do so.

68.1 The Ordinance requires a sale of the kind in question to be approved by the Administrator (now the Premier). The decision to approve the sale was taken by the Acting MEC for Local Government. Absent a lawful delegation, the purported approval was invalid.

68.2 Section 140(1) of the Constitution requires any decision of a Premier which is taken in terms of legislation or which has legal consequences to be in writing. If that decision concerns a function assigned to another Executive Council member, then section 140(2) requires the written decision to be countersigned by that member.

68.3 In the present matter, no evidence of the Premier's written decision to assign the power to approve the sale to the Local Government Minister (Makhaye) or the Acting Local Government Minister (Mabuyakulu) was ever presented. More fundamentally, although a purported written appointment of Mabuyakulu as acting MEC was put up (which constituted a decision to assign Makhaye's powers to Mabuyakulu), it is not disputed that this was never countersigned by Mabuyakulu as is required by Section 140 of the Constitution and hence there has been a failure to prove a lawful delegation.

68.4 It follows that Mabuyakulu lacked the authority to approve the sale. The challenge to Mabuyakulu's authority was pointedly raised in the papers and was not meaningfully answered by the Local Government Minister. This argument was not considered by the High Court.

68.5 The provisions of Section 140 of the Constitution are mandatory. The acting MEC's absence of authority had the effect of vitiating the approval and hence the sale to Rinaldo.

69 Fourth, the sale was not properly advertised as required by section 234 of the Ordinance.

69.1 Section 234 of the Ordinance requires a municipality to advertise its intention to dispose of immovable property. The purpose of the

section is to enable the public at large to be apprised of the intention to sell property so that objections to any proposed sale can be considered.

69.2 In the present matter, eThekwini's executive committee approved the sale on 25 November 2003 and an advertisement was published in the press on 12 December 2003.

69.3 Quite remarkably, on the very day that the advertisement was placed (12 December 2003) eThekwini and Rinaldo concluded the sale agreement. eThekwini has never explained this and has simply contended that the date of signature of the agreement is irrelevant.

69.4 The terms of Section 234 of the Ordinance are peremptory. The section does not contemplate or permit an agreement being concluded before the public process is completed. This would defeat the very purpose of the section.

69.5 The section confers a right to be heard on the public at large. The right is not simply intrinsic to the principle of natural justice but is also conducive to sound decision-making. The section is explicit in requiring notice and the receipt of objections before any decision is taken.

69.6 The consequence of eThekwini concluding an agreement with Rinaldo before the objection process was finalised resulted in the

public's right to be heard being compromised and was contrary to the purpose and requirements of Section 234.

69.7 Section 234(3) also requires a copy of the terms and conditions to be made available for inspection "**in both official languages**". It is not in dispute that these provisions were not complied with. Only a copy of the terms and conditions of the contract in English were made available.

69.8 The sale of the property to Rinaldo was an exceptional transaction and strict compliance with the provisions of Sections 234(3) was central to the validity of that transaction. Non-compliance with the provisions of Section 234(3) accordingly rendered the transaction a nullity.

70 Fifth, the relevant authorities did not observe the requirements of procedural fairness in purporting to effect the sale.

70.1 In disposing of the property, the Local Government Minister and eThekwini exercised a public power and were thus under a duty to act fairly and in accordance with Constitution. That duty, at a minimum, entailed affording Giant Concerts (and other objectors) a fair hearing and doing so with an open mind.

70.2 The conduct of both the Local Government Minister and eThekwini in the administrative process has been pervaded by a marked absence of procedural fairness in relation to Giant Concerts. The

evidence demonstrates that Rinaldo was afforded undue preference.

70.3 As early as March 2003, the real estate department recommended that Videovision's proposals be supported at a stage when no firm proposals had been made. During November 2003, after certain proposals had been made, the real estate department recommended to its executive committee that Videovision's proposal should be accepted. This was at a stage when no other proposals had been considered nor any public participation permitted.

70.4 eThekwini's executive committee accepted the recommendation of the real estate department without question. eThekwini did not consider alternative proposals from other parties before it took the relevant decisions. Although other individuals requested an opportunity to advance proposals, there is no evidence that these were seriously considered or even entertained. eThekwini even deviated from its own Land Alienation Policy in resolving to sell the properties to Rinaldo.

70.5 On 25 November 2003, the real estate department's recommendations were accepted by eThekwini's executive committee. This affirmation of proposals was never disclosed to Giant Concerts. The true facts were, however, disclosed to Rinaldo's attorneys.

70.6 Despite hearing the objections on 15 January 2004, Giant Concerts was never notified of the outcome of the objection and no reasons were furnished to it for rejecting the objection

70.7 The true factual position was misrepresented to Giant Concerts: in its letter of 11 February 2004, eThekwini's real estate department did not disclose that it had already recommended that the objection should be rejected and had requested the executive committee to reaffirm its earlier decision. The true facts were, however, disclosed to Rinaldo's attorneys.

70.8 The letter to Giant Concerts of 11 February 2004 afforded it a legitimate expectation that it would be notified of eThekwini's decision on the objection, provided with reasons therefor and otherwise afforded an adequate opportunity to contest that decision. This legitimate expectation or duty to act fairly was not honoured because Giant Concerts was never directly informed that its objection had been rejected. It only learned that this was the case informally after discovering that the Municipality had approved the sale and requested the Premier's consent. No opportunity was given to contest the rejection of the objection and no reasons were given for the rejection of the objection.

70.9 Neither the Premier nor the Local Government Minister afforded Giant sufficient procedural fairness rights. Giant's attorneys corresponded with the Office of the Premier and requested an

opportunity to be heard before a decision was taken approving the sale. This correspondence was not meaningfully responded to and Giant Concerts was denied the opportunity to be heard.

70.10 Where there is a right to be heard, the failure to afford a hearing vitiates the entire process. This is precisely what transpired in the present matter.

70.11 I submit that eThekwini's decisions to approve, and the Local Government Minister's decision to consent to the sale, fell to be reviewed and set aside and the High Court was correct in so holding.

71 Sixth, the decision to dispose of the property was unreasonable in the circumstances of the case.

71.1 The decisions taken by the Local Government Minister and eThekwini were required to be reasonably taken and rationally connected to the purpose for which they were taken and the objects of the Ordinance. This was clearly not the case in the present matter.

71.2 The entire sale was predicated on the provisions of Section 233(8) of the Ordinance. That section provides that a property can only be sold by private bargain if the Municipality is satisfied that the interests of the borough would be better served by such private bargain than by a sale by public auction or by public tender or

other circumstances connected with the proposed transaction justified such a course.

71.3 There is no evidence that eThekwini gave consideration to:

71.3.1 Potential benefits of the sale of the properties through a public process.

71.3.2 Inviting proposals from the public for the same developmental objectives.

71.3.3 As had been suggested by the late MEC Makhaye, a sale by public auction or tender with the council reserving the right to award the land to the developer who could best address the developmental needs of the City of Durban.

71.4 eThekwini also did not seriously consider proposals made by at least two other parties and did not consider public complaints concerning the sale.

71.5 In regard to the agreement of sale, the following material considerations were not considered by eThekwini:

71.5.1 The effect of the sale was to afford Rinaldo the sole right and power to decide when and to whom to resell any part of the property; to derive a profit from the resale thereof; to determine what developmental purpose the property should be used for.

71.5.2 The agreement did not restrict the sale of the shareholding in Rinaldo and hence an indirect disposal of the property.

71.5.3 The relocation costs of the military potentially reduced the purchase price.

71.5.4 The effect of the “claw back” provisions, at best, was to permit Rinaldo to realize at a later stage the historical market value of the property, but not to compel any party that acquired any part of the property to develop such part in the best interests of the city.

71.6 eThekwini relied on various valuations. These were, on the very terms of those valuations, unreliable. I am advised that expert opinion must be based on facts and the facts must justify the opinion even if the facts are difficult to establish. The “opinion” is otherwise worthless.

71.7 The Local Government: Municipal Finance Management Act 56 of 2003 commenced on 1 July 2004. Section 14 (5) refers to the supply chain management policy contemplated in Section 111, the latter of which only came into operation on 1 December 2004.

71.8 It is common cause that as at 1 December 2004 (when Section 111 became operative) the sale had not been finalised since eThekwini had not acquired the portions of the properties owned

by the State.It was therefore incumbent upon both eThekwini and the Local Government Minister to have given consideration to the provisions of Section 14 of the Act, which expressly requires a public process for the disposal of municipal capital assets and their failure to do so vitiates their decisions.

71.9 The same conclusion is reached whether or not a supply chain management policy was in place. eThekwini was still bound to act openly, transparently and fairly.

71.10 Although the primary purpose for selling the properties to Rinaldo was to permit the development of the film studio, neither eThekwini nor the Local Government Minister had regard to the fact that approximately five hectares of the property were required for this purpose whereas the full extent of the property constituted some twenty-one hectares.

71.11 Insofar as the Local Government Minister is concerned, the following additional material considerations were not taken into account:

71.11.1 The Minister’s predecessor, MEC Makhaye, had expressed grave reservations about a private sale and recommended a public process. There is no evidence that these reservations were addressed.

71.11.2 Certain material considerations were raised in the memorandum prepared by the acting head of department during July 2004. Examples include the following:

(a) A Municipality sells a property by private bargain only in exceptional cases.

(b) The sale of the property was contrary to eThekwini's Land Alienation Policy.

(c) eThekwini would be required to fund the relocation costs of the defence force, which would reduce the sale price for the property from R15 million to approximately R9.5 million.

(d) The advice received concerning a likely payment into the Public Improvement Fund was not accepted, and the department remained of the view that the provisions of section 37(2) of the Durban Extended Powers Ordinance "**imposes a statutory duty on the Municipality to make payment into the Public Improvement Fund.**" This was an issue of "**primary concern**" to the department.

71.12 I consequently submit that the decisions were not reasonably taken.They are also not rationally connected to the purpose for which they were apparently taken nor the purpose of the

Ordinance.The decisions were therefore reviewable under the provisions of Section 6(2)(f)(i) of PAJA and were correctly reviewed and set aside.

PROSPECTS OF SUCCESS AND INTERESTS OF JUSTICE

72 In the light of the above facts and submissions, I submit that Giant Concerts has reasonable prospects of success in the appeal.

72.1 There is a reasonable prospect that the Constitutional Court may prefer Giant Concerts'interpretation of the provision to the reading adopted by the Supreme Court of Appeal.

72.2 This is particularly so in the light of the fact that theHigh Court reached a different conclusion to the Supreme Court of Appeal. Indeed the High Court was so confident of the correctness of its approach that it refused to grant Rinaldo Investments leave to appeal.

73 Moreover, I submit that it is in the interests of justice for leave to appeal to be granted.

73.1 The applicant has been deniedthe opportunity to submit a proposal for the purchase of the property to eThekwini.

73.2 In addition, I respectfully submit that there is a broader public interest in obtaining clarity regarding the proper interpretation of the Ordinance.

73.3 The interpretation of the SCA will have far-reaching consequences. It entails that only rate-payers of a given municipality have standing to challenge decisions of those municipalities in certain circumstances. Its consequence is to significantly narrow the pool of participants when municipalities seek to enter into contracts of sale, and thereby to reduce openness, transparency and competitiveness, to the detriment of the public interest.

74 In these circumstances, I respectfully seek leave to appeal and ask for an order in the terms set out in the notice of application for leave to appeal.

K.M GAYADIN

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KARAMCHAND MODILAL GAYADIN

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at Pietermaritzburg on this the 17th day of April 2012, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

“LOGANATHAN CHETTY”

COMMISSIONER OF OATHS:
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