IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT 25/12

In the matter between :

GIANT CONCERTS CC	Applicant
and	
RINALDO INVESTMENTS (PTY) LTD	First Respondent
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

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned, **SUDHIR NANOO PRAGJEE**, do hereby make oath and say.

1. I am a director of RINALDO INVESTMENTS (PROPRIETARY) LIMITED, and make this affidavit in support of its opposition to the application for leave to appeal to the above Honourable Court. Where I make legal submissions in support of that opposition, I do so on advice.

2. I have read the affidavit of GAYADIN delivered in support of the application for leave to appeal, and have read, and am familiar with the contents of

   (a) the judgments of the Supreme Court of Appeal and the KwaZulu-Natal High Court which have been delivered in this matter; and

   (b) the papers in the main application.

3. I am advised that an application for leave to appeal to the Constitutional Court turns on two issues, namely

   (a) the question as to whether the case raises constitutional issues; and

   (b) whether it is in the interests of justice that the matter be placed before the Constitutional Court for re-adjudication.

4. I am advised that in a number of respects the matters raised by Gayadin are technically constitutional issues but deny that any of them are matters of substance on which a ruling by this court is desirable, certainly within the framework of this unfortunate piece of litigation.

5. The first respondent submits that it is not in the interests of justice that this matter proceed any further. I propose to dwell on this because in the first respondent's respectful submission this case is one in which the administration of justice has failed the first respondent and the community of eThekwini, who had and continue to have a vital interest in the establishment of a viable international standard film studio complex in their city.

6. (a) The first respondent has charged me with the duty of monitoring this litigation. I was in attendance when the application was argued in the Pietermaritzburg High Court, when the application for leave to appeal was argued and summarily refused, and when the appeal was argued before the Supreme Court of Appeal. I am acquainted with the papers, which in the form they took in the appeal record ran to over 900 pages. (The first respondent's answering affidavit, including annexures, contributed only 66 pages to the record.)

(b) I was the lead representative of the first respondent when the agreement with the municipality was being negotiated. I attended all meetings with the municipality's representatives, and signed the agreement on behalf of the first respondent.

(c) After the municipal process was concluded, and the agreement was referred to the MEC to seek approval, it came under intense scrutiny at provincial level. I represented the first respondent when it was required to attend meetings called by provincial officials who sought further information concerning the agreement, in order to satisfy themselves that the municipality had acted properly in concluding the agreement.

7. Four sets of counsel appeared in the High Court representing the present applicant, and the present first, second and third respondents. The argument took two days.

8. Only two parties argued before the Supreme Court of Appeal, the other two respondents having abided the decision of the court. Nevertheless the argument took a full day.

9. I am informed that first respondent's counsel counted some 29 points that had been taken by Gayadin in his affidavits delivered in support of the application to review and set aside the decision and contract in question. Although the case had to be prepared upon the basis that all of these would be pursued, many of them were not raised in argument before the High Court. In the Supreme Court of Appeal the number of

issues was cut down a little more, although one which had not been argued before the High Court was raised on appeal.

10. Throughout this process the central question which has occupied my mind is the question as to how it can be that the law would allow Gayadin (ostensibly acting through Giant Concerts CC), who had no legitimate interest at all in the matter, to do what he was doing. By litigating he was preventing the implementation of a plan to establish a film industry for the very substantial benefit, both in the fields of employment and tourism, of eThekwini. From the first respondent's commercial perspective Gayadin has through this litigation managed a very considerable disruption to a promising and exciting commercial venture without any discernible advantage to himself.

11. The Supreme Court of Appeal answered that central question only, and confirmed that he had no legitimate interest in the matter.

12. That rendered it unnecessary for the Supreme Court of Appeal to answer all the other questions raised before it on appeal. Gayadin now suggests in his affidavit that those other issues have some merit, a contention which I reject. However furnishing an answer to his submissions which properly addresses them and illustrates why they are without foundation will take more space on paper than the first

respondent is allowed. The way in which this application has been presented shows that the deponent appreciates and has taken advantage of the fact that putting up the skittle requires much less effort and application than knocking it down.

13. I accordingly propose to concentrate on the provision of an account of what this case is actually about, especially insofar as it bears upon the questions of the interests of justice and whether the applicant ever had standing in this matter. I must then deal with certain portions of the founding affidavit before this Honourable Court to which the first respondent objects. I will then summarise the first respondent's answers to the contentions made by Gayadin as to the applicant's grounds of review.

THE FACTS

14. Fortunately a lucid and concise summary of the main facts appears in paragraphs 2 to 9 of the judgment of the Supreme Court of Appeal, and I respectfully ask that this Honourable Court has regard thereto. I propose simply to expand on one or two areas where, in my submission, it is important that more detail be provided. (An account of the legislative framework in the context of which the events unfolded appears in paragraphs 17 to 24 of the judgment of the SCA.)

15. In paragraph 22 of his founding affidavit before this court (and elsewhere, such as in paragraph 71.11.2) Gayadin seeks to present the contract between the municipality and the first respondent as one in terms of which R71 million worth of land was bought for only R15 million. That reflects the picture he tried to paint in the original papers, and indeed in his frequent engagements with the press throughout this litigation, which has resulted in misleading reports having the effect of unfairly tarnishing the reputations of Mr Anant Singh, the principal of the companies involved in the proposed development, and of course of those companies.

16. The papers reveal that both the province and the municipality had decided to pursue the establishment of the film industry in Durban. The municipality investigated the position, and established that when a film studio was established in Cape Town, that City contributed R60 million to the project, and that the provincial administration had also set aside R8,8 million to bolster empowerment in that industry.

17. eThekwini's approach was that it did not wish to provide money, but instead land.

18. The construction of a film studio and associated activities was going to cost hundreds of millions of rands. The returns on such an investment are not immediate. Through a long drawn out process of negotiation a contract was accordingly put together reflecting the following arrangement upon which the municipality and the first respondent had agreed.

(a) The first respondent would acquire from the municipality a larger piece of land than was necessary for the film studio and its associated facilities (these being called the “core activities” in the contract.)

(b) The contract reflected that the so-called “price” of R15 million was based upon the use of all of the land for the core activities. It also recorded that if all of the land was rezoned for its highest and best use, the price would be R71 million.

(c) The contract then provided for the operation of the so-called “claw back” provision referred to in paragraph 5 of the judgment of the SCA. A carefully negotiated formula is contained in the contract providing for an increased price (based upon the R71 million valuation) to be paid by the first respondent to the municipality in respect of the use (or sale for use) of any portion

of the property for a non-core activity. It was contemplated that this would happen. Indeed, the contract obliged the first respondent to prepare a master plan for the non-core development of the land which was restricted to hotels, residential accommodation not being part of the film studio complex, and retail activities and office accommodation also not part of the film studio complex. The contract did not purport to interfere with the municipality's ordinary rights and duties with regard to town planning, building approvals and so on, which would have to be exercised and discharged in the ordinary course. But the cost of the planning would have to be carried by the first respondent.

(d) Only the land used for the core activities would be bought for a price representing a ratio of 15 : 71 of the value it would have had if it was zoned for its highest and best use.

19. The municipality's contribution to the establishment of the film industry was accordingly

(a) by way of allowing the first respondent the opportunity of deriving a development profit where non-core activities were pursued; and

(b) a reduced price for the land on which the core activity itself was to be established.

This was a viable and sensible alternative way in which the municipality could make a contribution to the establishment of the industry, instead of disgorging cash as was done in Cape Town.

20. It is accordingly grossly misleading to present this case as one concerning the sale by a municipality of land to the value of R71 million for R15 million.

21. Furthermore, Gayadin's statement in his notice of objection (quoted in paragraph 7 of the judgment of the SCA) that he would offer something "greater than the present offer submitted to you, which offer I am given to understand is R15 million" is meaningless. The municipality had to follow the process laid down for the sale of its land, but the sale itself was but one component of a scheme to establish a film industry in the municipal area. The land was not offered or available for sale for any other purpose.

22. The City gave Mr Gayadin an oral hearing after receipt of the written objection which is quoted in paragraph 7 of the judgment of the SCA. At that meeting the municipal officials explained the claw back

provisions I have described above. Gayadin's only response was to say he would pay more (more than what is not clear) but he declined to indicate how much.

23. The affidavit from the official concerned explains that the background to the decision to sell the site to the first respondent was explained to Gayadin, as was the structure of the agreement. He was obviously asked to explain his interest. His response was that the applicant "was involved in the entertainment industry and imported videos primarily from India for distribution", and that he wanted an opportunity to purchase the site.

24. At the same meeting Gayadin was invited to disclose his proposals for development of the site but he declined to do so saying they were confidential. The deponent goes on to say that Gayadin was unable to "indicate or furnish us with any evidence of his involvement in or knowledge of the film industry itself".

25. He was told at the end of that meeting that nothing he had said could serve to justify a change of mind on the municipality's part, and that this would be reported to the relevant committees or decision-makers.

26. Gayadin had every opportunity when presenting his case for review to establish that he had a plan for the development of the site which would coincide with the municipality's decision to establish a film studio there; and indeed to establish the credentials of Giant Concerts CC as a viable alternative purchaser on any basis. It was not done despite the fact that Gayadin presented three affidavits (two founding affidavits and a reply) over a period of three and a half years.

27. (a) In the first respondent's answering affidavit in the application Anant Singh drew attention to the fact that the objection had apparently been made in the name of the applicant close corporation (although there was confusion as to which close corporation), but that the only person involved in all of this was Gayadin himself. (On the papers there was no indication that the applicant was actually doing business at all, let alone that Mrs Gayadin played any part in any business activity in her capacity as the sole member of the applicant.)

(b) But Gayadin was prohibited by law from taking part in the management of a close corporation.

(c) It was pointed out that Gayadin had been convicted of running an illegal casino (for which he was sentenced to 10 years

imprisonment suspended for five years); illegally storing gambling equipment (for which he was sentenced to a fine of R50 000.00 or six months imprisonment); of money laundering under the Prevention of Organised Crime Act, involving extremely large sums of foreign currency (for which he was sentenced to a fine of R200 000.00 or two years imprisonment, half of which was suspended); and five counts of making false statements in income tax returns (for which he was sentenced to two years imprisonment suspended for five years).

(d) It was sought to argue on behalf of the first respondent (although I concede that it is difficult to frame the argument in a clear juridical box) that the application should fall to be dismissed on account of the aforegoing alone, as it was (I would say incontrovertibly) the product of the exercise of the unlawful management of the affairs of a corporate body.

28. Gayadin has cynically mis-used the court process to obstruct the establishment of the proposed film industry in eThekwini with no discernible advantage to himself. It is submitted that it is simply not in the interests of justice to allow this matter to proceed any further.

29. As is recorded in the judgment of the Supreme Court of Appeal, the applicant purports to come before the court in its own interests, as contemplated by section 38(a) of the Constitution. Indeed one of the judges during the hearing in Bloemfontein asked counsel for the applicant whether that was in fact correct, and an affirmative answer was given. That was the basis of the applicant's objection, both when it was written by Gayadin, and when he was afforded a hearing by the municipality.

30. But it is not possible on the papers before the court to see what interest the applicant actually has. All that can be discerned is the aim of the litigation. It is and has from the outset been to disrupt and if necessary destroy the contractual relationship between the municipality and the first respondent aimed at establishing a film industry in eThekwini. The motive for that destructive intent does not appear on the papers.

THE COURSE OF THE LITIGATION

31. The application was launched out of the High Court on 3 May 2005. The first respondent's answering affidavit of Anant Singh was delivered in June 2005.

32. I understand that there was a skirmish and that there were interlocutory applications in connection with the record. Nevertheless the municipality's answering affidavit went in during August 2006 and the answering affidavit of the MEC in August 2007. These delays were out of the first respondent's control. We depended on the other respondents to elucidate a process in which the first respondent was in effect a bystander.

33. The applicant, claiming that an application to compel the furnishing of the record was only finalised on 21 November 2007, then asserted a right to and did put in a supplementary founding affidavit on 4 December 2007, including an amended notice of motion.

34. This then generated a second answering affidavit by the municipality in May 2008, and one by the MEC in September 2008.

35. In the circumstances, through no fault of ours, this matter only came before the High Court for argument in June 2009. The learned judge in the High Court then took 15 months to produce his judgment.

36. (a) When, during the course of the application for leave to appeal, paragraph 82 of his judgment (appearing at page 46 of the annexure before this court) came up for debate, it became

apparent that the learned judge had looked at a video tape and a photographic presentation (which had been furnished by the municipality as part of the record, but not referred to in the papers) which had been presented to the municipality by the first respondent in order to illustrate its general planning intent and its record and capacity in the film industry.

(b) The learned judge had somehow come under the impression that these somewhat impressive presentations belonged to Giant Concerts CC, despite the fact that on the papers Gayadin had not denied the allegation that he had failed to reveal his plans to the municipality because they were “confidential”.

(c) The record of this portion of the argument in the application for leave to appeal was presented to the Supreme Court of Appeal as part of the overall record, because of its obvious importance when one reads the judgment of the High Court. If Gayadin (or Giant Concerts CC) was genuine, then that might lend some legitimacy to his objection, to his claim to *locus standi*, to his claim to be interested in the legalities of the process, and more fundamentally to his complaint that the first respondent was favoured above the applicant, and that the municipality’s approach was “one-dimensional”.

37. Ignoring the protests of the first respondent's counsel that the origin and nature of this error needed to be investigated, the learned judge immediately gave judgment refusing leave to appeal. In doing so he made no mention of his error.

38. It was accordingly necessary for the first respondent to petition the Supreme Court of Appeal for leave to appeal. That of course further lengthened the process.

39. We are now a few days short of the seventh anniversary of this litigation. The contract between the first respondent and eThekwini Municipality contains suspensive conditions with no fixed date for fulfilment. The applicant seeks to argue, as it did in the Supreme Court of Appeal and in the High Court, that those conditions have lapsed and that some relief is due to the applicant on that basis. Of course the first respondent's submission is that as a third party to the contract the applicant has no right to seek an order declaring a contract between two other parties terminated.

40. But be that as it may, the lapse of time in this litigation obviously means that there are issues that need to be addressed between the first respondent and the municipality concerning the fulfilment of the

suspensive conditions. The municipality has unsurprisingly taken the view that this must be put on hold pending the final determination of this litigation. But in practical terms it is simply wrong and unjust, I submit, that the applicant and Gayadin should be allowed to maintain this litigation any longer as an obstacle to the finalisation of the business between eThekwini Municipality and the first respondent.

THE APPLICANT'S ACCOUNT OF THE FACTS

41. The applicant has given an account of the facts obviously focused on those which might aid its attempt to persuade this Honourable Court that there may be some merit in the review proceedings. I will restrict my response to those allegations which, in the first respondent's submission, generate glaringly inappropriate inferences or implications.

42. **Ad paragraph 4**

(a) It seems obvious that the Durban addresses set out in paragraphs 4.2 and 4.3 have been put before this court with a view to try and establish some connection between the applicant and Durban or eThekwini. Those addresses appear nowhere in the papers which served before the High Court and the Supreme Court of Appeal and the first respondent objects to the introduction of

such allegations, especially without a disclosure that they did not feature in the application.

(b) To the extent necessary the allegations in paragraphs 4.2 and 4.3 are accordingly denied. (See further paragraph 45 hereunder.)

43. **Ad paragraph 22**

I have already pointed out that it is simply wrong to treat this as a sale for R15 million. I merely add that the real estate committee did not approve a sale at R15 million, but a sale with the claw back provisions which I have already discussed.

44. **Ad paragraph 24**

What the deponent describes as a "written agreement of sale" was in fact a written agreement of sale subject to suspensive conditions, one of which was that all necessary administrative approvals be obtained; that is to say that, *inter alia*, the process laid down by the Ordinance for the sale by private treaty of land at a price less than its full value had to be followed; and there would be no sale unless the process resulted in the ultimate approval of the transaction by both the city and the Province.

45. **Ad paragraph 25**

(a) It is simply misleading to state that the applicant wished to make an alternative offer for the same property to develop it for the same purpose when it is incontrovertible on the papers that the applicant declined to give any description of what it intended to do at the time when the proposal had to be considered by the municipality; that such information was not even forthcoming in the application; and that the applicant has never tendered any information going to the questions as to its financial capacity or technical ability to design, establish or run a film studio complex of any sort.

(b) The reliance in sub-paragraphs 25.1 and 25.2 on annexures “3” and “4” is something new. No significance can attach to those documents.

(c) I refer to paragraphs 8 to 13 (at pages 6 to 9) of the judgment of the High Court where the learned judge deals with an objection taken upon the basis that whereas the resolution to launch the application bore the name of Giant Concerts CC, the registration number in fact belonged to another close corporation called Realgem Investments CC.

(d) The applicant was only formed in July 2003, five or so months before Gayadin lodged an objection to the transaction with the municipality. The letter of objection (annexure "3") reflects below the name "Giant Concerts CC" the registration number of Realgem Investments CC. It is accordingly not possible to say that the postal address in Umhlanga Rocks, which appears on that letterhead, is the postal address of Giant Concerts CC or Realgem Investments CC.

(e) My lawyers have consulted Cipc (formerly Cipro) with regard to Giant Concerts CC. Cipc records reflect postal addresses. The current registered postal address of the applicant is P O Box 185, Luxmi, 3207, which is in the Msunduzi (Pietermaritzburg) district.

(f) The history report on the applicant shows that it had an earlier postal address of P O Box 8717, Cumberwood, 3235, which is also within Msunduzi (i.e. the Pietermaritzburg district). That was the applicant's postal address when the main application was launched. A Cipro report to that effect is annexed to the first respondent's answering affidavit of June 2005.

(g) I accept that this information I give regarding the current Cipc search cannot be presented at this late stage in answer to the applicant's reliance on annexures "3" and "4", but it does provide an answer to the allegations I have already dealt with (those in paragraphs 4.2 and 4.3) which suggests, with respect, that caution needs to be exercised regarding an apparent attempt by the applicant to make of this case something that it was not before.

(h) Notwithstanding the aforegoing I respectfully point out that the use of a box number is hardly sufficient evidence of what the applicant seems to be trying to establish: that is the interest of a business person within the geographic area of the eThekwini Municipality. That is presumably why the allegations in paragraphs 4.2 and 4.3 appear in the founding affidavit.

(i) The first sentence of paragraph 25.3 is disrespectful of the judges of the SCA who heard this matter. Their attention was not drawn to annexures "3" and "4". (Neither, for that matter, was it drawn to the first respondent's attention at any stage.) There was no allegation on the papers before them that the "primary place of business" of Giant Concerts CC was in eThekwini. In paragraph 3 of the first founding affidavit it was alleged that Giant Concerts

CC carried on business "in promoting live concerts and property development especially in Durban", but none of the respondents admitted that allegation, and there was no proof that Giant Concerts CC actually carried on any business at all.

46. **Ad paragraph 28.1**

Gayadin was told when he was given a hearing by the municipality that the recommendation of the committee would not support his objection.

47. **Ad paragraph 32**

A letter from the municipality to the applicant advising the applicant of the outcome was overlooked. However it was widely reported in the press.

THE JUDGMENT OF THE SCA

48. The applicant's challenge to the correctness of the judgment of the SCA is set out in paragraphs 47 to 61 of the founding affidavit. I will not answer those paragraphs *seriatim* but will refer to paragraph numbers where that will be of assistance to this court.

49. Before dealing directly with the applicant's analysis of the judgment of the Supreme Court of Appeal I am advised that it is appropriate to

mention the implications of the argument raised in paragraph 59.2 of the founding affidavit (which is echoed elsewhere).

(a) The applicant states repeatedly that central to this application is a so-called "legality challenge". I observe that in their content the "legality challenges" raised by the applicant are largely if not wholly complaints about minor and inconsequential alleged technical infringements.

(b) What the applicant is advancing is the proposition that the question of *locus standi* is a non-issue in the case of a legality challenge. In doing so Gayadin mis-reads the paragraph referred to of the judgment of this court in the **Kyalami Ridge** case (citation in paragraph 59.2) and overlooks the judgment of this court in **Kruger v President of Republic of South Africa and Others 2009 (1) SA 417 (CC)** at paras 24 to 26.

(d) I submit that if this Honourable Court is at some stage going to entertain full argument on the proposition as to whether absolutely anyone can make a legality challenge, then it is not in the interests of justice that it be done in this case. I have already addressed this subject. In short, the applicant has no discernible

interest in the outcome of this case, save for costs; and an end must be put to the ruinous effect of this litigation.

50. The first respondent submits that it is an over-simplification and misinterpretation of the judgment of the SCA which leads to the conclusion that it holds that only ratepayers have the right to approach the court in circumstances when administrative processes such as those stipulated in the then applicable Ordinance are employed.

51. What was decided by the SCA appears in the last sentence of paragraph 32 of the judgment.

> **"All that this judgment concludes is that Giant Concerts is not able to mount such a challenge in terms of s38(a) of the Constitution. It is not the right person in the right proceedings."**

52. In this application Gayadin asserts that he or the applicant is entitled to complain of having been deprived of an opportunity to establish a film studio on the land. But that assertion is impossible to accept on the papers (as has already been illustrated) because he never established that he (or the applicant) had or could muster a proposal for the development of a film studio on the land. And the Supreme Court of

Appeal found precisely that. I refer in this regard to paragraph 8 of that judgment at page 4.

53. Accordingly, when dealing later in the judgment with the question of the *locus standi* of Giant Concerts, it is important to note not only that the debate was confined to a litigant acting exclusively in his own interests (as contemplated by section 38(a) of the Constitution) but also that it had not been established on the papers that Gayadin occupied any position similar to that of a disappointed tenderer; with the result that it was impossible, and remains impossible, for him to assert standing on any basis other than that he might just as well be a citizen of Johannesburg or Cape Town with no connection at all to the film industry, and no conceivable interest in the disposition of municipal land in Durban.

54. That is the person or applicant or litigant whose *locus standi* falls under scrutiny in the subsequent paragraphs of the judgment of the SCA.

55. There may be, I submit, a minor error in the second sentence of paragraph 13 of the judgment of the SCA, which has no bearing on the correctness of the judgment. It is correct that the applicant does not have “ratepayer standing” in terms of the common law, but not on account of having its registered address outside of the eThekwini

Municipal area, but because it was not alleged that the applicant owned property within the municipal area.

56. There is nothing contentious about the opening sentence of paragraph 16 of the judgment (page 7) which launches the court's analysis of the statutory scheme in question. A decision on standing always involves measuring the facts concerning the position occupied by the litigant against or in the light of an analysis of the decision or conduct which the litigant seeks to impugn.

57. It is also uncontentious, as held by the SCA, that the decision sought to be impugned in this case turned on one issue only, namely whether the council was satisfied that what was proposed served "the interests of the borough".

58. The applicant then misrepresents (and if not that, misreads) paragraph 26 of the judgment. The paragraph is not the core finding in the judgment. The paragraph is to the effect that the advertising requirement is not an "invitation to the world at large" to object. Given the purpose of the enquiry (and the soliciting of objections to it) that must also be uncontentious.

59. Moving then to paragraph 29 of the judgment one sees in the first sentence that the SCA did not hold that only members of the local community may object. The advertisement may be directed at them, but what the court held was that those who may object are those who have an interest in the "interests of the borough". What follows in the second sentence of paragraph 29 of the judgment (in parenthesis) illustrates that the SCA was excluding from consideration persons who may object in the public interest, or on behalf of their members, and so on, because "this case is concerned with a litigant claiming to litigate in its own interest only". It is in that context and with that introduction that the court held that a ratepayer of Johannesburg or Cape Town has no interest in the matter. (See paragraph 30 of the judgment.)

60. The fact that the reasoning and judgment was confined peculiarly to this case is apparent not only from the summation of the judgment at the end of paragraph 32 (to which I have already referred) but also from what I have said above, and the observation in paragraph 30 of the judgment that the objection made by the applicant was not aimed at the "interests of the Borough". This was a decision personal to the applicant, and did not purport to decide who in fact would be the right person to make the complaints made by the applicant and Gayadin, if in fact there was any merit in them at all.

61. I add that the first respondent is not persuaded that the Supreme Court of Appeal was correct in not endorsing the first respondent's alternative approach to the matter, based on **Ninian and Lester (Pty) Ltd v Crouse NO and Others (2009) 30 ILJ 2889 (LAC)**. It is correct, as stated in paragraph 27 of the judgment, that the legislative provisions considered in that case are distinguishable from those in question here. But the principle applied in **Ninian and Lester** classified what I am advised PAJA calls "notice and comment procedures" as exercises in participatory democracy. It reasons in effect (but admittedly in a slightly different legislative context) that it would be wrong to fix on a legislature which stipulates such a procedure an intention thereby to give standing to any person, merely because that person chooses to put in an objection, when that person would not otherwise have standing in subsequent litigation concerning the decision. I submit that any other approach would open the door to administrative chaos bearing in mind, *inter alia*, that it would allow persons who have no real interest in the decision to obstruct administrative processes so as to advance some or other personal interest, or personal gain, which lies outside the legally cognisable scope and impact of the decision in question.

THE APPLICANT'S SUBMISSIONS ON WHY IT HAS STANDING

62. These are made mainly in paragraphs 57 to 64 of the founding affidavit. I submit that I have already said enough to answer paragraphs 57, 58, 59.1 and 59.2.

63. I am unable to understand what is argued in paragraph 59.3, but submit that it is not possible to construct an argument for standing around section 217 of the Constitution. If there is an alleged breach of section 217 of the Constitution, it is necessary for a litigant to show that it affects him or her in a way which gives standing.

64. The first sentence of paragraph 60 is not quite correct. The parties did not accept that Giant Concerts "validly objected". In its wording the advertisement was not restricted to any group. No-one could stop the applicant lodging an objection. (In the same way a citizen of a foreign country, passing through Durban, who happened to believe that film studios were not the employment generators and tourist attractions they were held out to be, could submit an objection.) It is not suggested that it would be correct for a municipality to disregard any such objection which went to the question of the interests of the Borough. That did not happen here. Gayadin was given an oral hearing, even though the Ordinance did not require him to be given one.

The point is that the SCA did not decide that only members of the community could submit objections. It decided that the advertisement was aimed at them.

65. (a) I have already dealt with the submissions in paragraph 64, which are basically to the effect that the issue of standing does not arise in a so-called “legality challenge”.

(b) The contents of paragraph 64.2 are not understood. A denial of standing, in the context of an enquiry into just administrative action, points to a finding that the matters complained of did not have a bearing on the applicant’s right under section 33 to just administrative action.

THE ALLEGED GROUNDS OF REVIEW ADVANCED BY THE APPLICANT

66. These are set out in paragraphs 66 to 71 of the affidavit placed by the applicant before this Honourable Court.

67. **Ad paragraph 66**

(a) It is denied that the sale was *ultra vires* section 233 of the Ordinance. The provision in question is quoted in paragraph 66.2 of the applicant's affidavit.

(b) As a matter of logic, the natural condition of property being that it is alienable, the requirement of section 233(1) of the Ordinance that the property should be "freely alienable" must mean that there is no impediment imposed on the right of free alienation.

(c) As a matter of fact the term "freely alienable" has a peculiar meaning within the context of the Local Authorities Ordinance, and indeed may be cross-referenced to the Town Planning Ordinance. Some land or interests in land held by a municipality are in effect held in trust (generally for the public) and are not "freely alienable". The purpose of stating the requirement in section 233(1) of the Ordinance that the property should be "freely alienable" is to make it clear that the section, designed as it is to permit alienation of land, is not intended to cover such property.

(d) As an example, section 26(4)*ter* of the Town Planning Ordinance, dealing with public places, makes provision for circumstances in which a municipality may alienate such property "as though such property were immovable property, freely alienable as contemplated by section 233 of the Local Authorities Ordinance, 1974 ....".

(e) The agreement between the municipality and the first respondent was subject to the suspensive condition that the land which had for many years been used by the defence force was returned, as contemplated by the condition in the title deed, to the ownership of the municipality. Even if one wishes to regard such a contract, subject as it is to suspensive conditions, as an alienation, then, pending fulfilment of the suspensive condition that the land revert to the ownership of a municipality, the contract would constitute in effect an alienation of a right or interest in the land, as contemplated by section 233(1) of the Ordinance.

68. **Ad paragraph 67 : Suspensive Conditions**

(a) I have already mentioned the first respondent's submission that the question as to whether a reasonable time for the fulfilment of

the suspensive conditions has lapsed is one as between the first respondent and the municipality.

(b) The answer to that question will, if a dispute arises, be determined applying principles laid down in **Cardoso v Tuckers Land and Development Corporation 1981 (3) SA 54 (W)** at 67, and the applicant has no interest in and cannot and has no right to make any contribution to the consideration of those factors.

(c) The first respondent has still not understood how,

(i) even if a third party has a right to interfere in the view taken by two others of their own contract, such an issue can arise in review proceedings; and

(ii) our courts and our law can permit such a third party, whose conduct in instituting litigation has delayed the fulfilment of suspensive conditions, to assert that whilst the contract might very well have been alive when the litigation started, it has fortunately (from that litigant's perspective) lapsed by reason of the obstacle to its fulfilment posed by the litigation he instituted.

(d) The contention regarding the municipality's "own version" in paragraph 67.4 is simply false. The applicant produced the letter relied on in reply only. The municipality had no opportunity to deal with it. But it is quite plain that the letter of February 2007 was an attempt to persuade the Department of Public Works to get moving. The municipality was represented in court to resist the review and defend the contract more than two years after that letter was written.

(e) The arguments raised in paragraphs 67.6 to 67.8 are again an attempt illicitly to take advantage of the delays caused by the applicant's litigation. In any event the applicant is mis-interpreting section 233(12) of the Ordinance. The sub-section deals with a sale which has not been "finalised" within two years of the decision to sell. The section says nothing about the need to "transfer" the property pursuant to the sale within a two year period. Clearly the "decision to sell" spoken to by the sub-section is the decision which sets the process in motion. It is "finalised" when, after the objections have been considered, the municipality decides to go ahead with the sale, and the MEC then approves it.

69. **Ad paragraph 68 : Authority of Acting MEC for Local Government**

(a) This question involves two contentions. The first is stated in the first sentence of sub-paragraph 68.3 and the second in the second sentence of that sub-paragraph.

(b) It is correct that in the papers no evidence was tendered of the Premier's written decision to assign the powers of the "Administrator" under the Local Government Ordinance to the MEC for Local Government. That, it turns out, was the product of a misunderstanding of the founding papers on the part of the MEC's lawyers responsible for drawing his answering affidavit. They thought that only the second contention (which I deal with hereunder) was being advanced.

(c) The first contention was never argued before the High Court. Before the SCA the first respondent's counsel produced for the court the provincial gazette issued pursuant to the provisions of the Interim Constitution which conferred the powers in question on the MEC responsible for local government. I should mention that counsel for the first respondent pointed out to the judges in the SCA that if there was a ruling that this process of conferring powers of provincial Administrators on different MECs, employed

as far as we know uniformly or near uniformly throughout the country, was challenged at this late stage, then many thousands of decisions made by such MECs throughout the country would be at risk; and that it was most unsatisfactory that this should be argued for the first time in the SCA when the MEC had made the decision that there was no need for him to be legally represented at the appeal.

(d) As to the second contention, it is correct that the appointment of the acting MEC was made in writing by the Premier, and that it was not counter-signed at all.

(e) The applicant seems to say that the appointee needs to counter-sign it. But section 140(2) of the Constitution requires the document to be counter-signed by an MEC if it concerns a function assigned to that MEC. That cannot conceivably apply to the recipient of an acting appointment, as it does not concern a function assigned to him until the acting appointment is actually made.

(e) Furthermore, although the applicant appears no longer to argue this point, section 140(2) of the Constitution cannot be read to require the signature of the MEC whose function is involved (in

this case MEC Makhaye) if the Premier is forced to make an acting appointment because, by reason of the very illness, accident or other circumstance justifying an acting appointment, the affected MEC (Makhaye in this case) is unable to sign. (The MEC died as a result of the illness which gave rise to the acting appointment.)

70. **Ad paragraph 69 : Signing on the day of the Advertisement and Both Official Languages**

(a) It is simply not true that eThekwini Municipality has never explained the signature of the agreement on the day of the advertisement.

(b) The section in the Ordinance required that a “copy of the terms and conditions” of the proposed sale be available for inspection during the period of advertisement.

(c) It was argued, correctly in my submission, that the proper course for a municipality in any case like this is to sign the agreement before launching the “notice and comment” procedure, as the procedure itself consumes both financial and human resources. Such an agreement should be signed subject to the suspensive

condition that it is finally approved under the Ordinance before it comes into effect. That prevents the prospective purchaser from backing out of the transaction after the whole process has been followed because of a change of mind.

(d) To that may be added that in our law a sale subject to a suspensive condition is not a sale, as a result of which it is simply wrong to contend that a sale was concluded before objections were solicited.

(e) There can be no merit in the argument that the signature of the agreement in advance of advertisement compromises the public's right to be heard. The sections governing these transactions require the municipality first to formulate an intention to sell, and indeed to negotiate the terms and conditions of the sale, before starting the process. (The terms and conditions have to lie for inspection by potential objectors.) There cannot be any difference between stopping there, or adopting the alternative route of inserting a suspensive condition rendering the agreement subject to the process resulting in the sale being confirmed, and signing it on that basis.

(f) Insofar as “both official languages” are concerned, the applicant simply ignores item 3(1)(f) of schedule 6 to the Constitution which is to the effect that a reference to an official language or languages must be construed as a reference to any of the official languages under the new Constitution. That must mean any one language.

(g) Interpreting item 3(1)(f) to convey that when any old order legislation refers to “both official languages”, any <u>two</u> of the new 11 official languages must be employed, would have had the effect of entrenching English and Afrikaans. Judicial notice can surely be taken of the fact that the translation services necessary to meet every such stipulation governing national, provincial and local government notices and the like were then simply not available in order to facilitate the immediate fair treatment of the other 9 official languages. (Subsequent legislation concerning, for instance, municipal affairs, has dealt with language policies and the like in an attempt to advance and entrench the use of languages apart from English and Afrikaans.)

71. **Ad paragraph 70 : Procedural Fairness**

(a) I do not propose to answer all of the submissions made in this paragraph. They are without merit, and very largely constitute conclusions quite incorrectly drawn because, even where some facts are correctly stated, there is no factual foundation which justifies classifying what happened as “unfair”.

(b) I submit that the account of the facts given in the judgment of the SCA, expanded on in this affidavit, illustrates that the deponent, Gayadin, is trying to isolate inconsequential events and inconspicuous features of a very substantial process when, in truth, even if they are all added together they cannot justify reviewing and setting aside the decisions under attack. I nevertheless mention one or two matters which may be disposed of easily.

(c) The process described in paragraph 70.3 is what the Ordinance contemplates. There were firm proposals in March 2003.

(d) There is no evidence that the executive committee accepted the recommendation made to it “without question” as alleged in paragraph 70.4.

(e) It is not correct that "other individuals requested an opportunity to advance proposals". A Mr Chowdhary wrote from India in April 2003 (many months before the decision to proceed with the advertising process was made) indicating that what appeared to be some Indian interests he represented would be interested in developing a film city "provided all the terms and conditions and formalities are feasible". That letter appears to have been forgotten by the officials by the time that the council had to make a decision as to whether or not it would pursue the process. Chowdhary did not respond to the advertisement, despite the fact that he had advised the City of a local contact point. No more was ever heard from him.

(f) The municipality was entitled to act outside its land alienation policy, such policy being a guideline.

(f) There appears to be a typographical error in paragraph 70.5. The acceptance by the municipality's executive committee on 25 November 2003 of the proposed and recommended sale to Rinaldo was the municipal council's decision <u>to commence</u> the process. Neither Gayadin nor Giant Concerts CC had come onto the scene at that time. If it is intended to complain that, after it

had considered the objections, the council's real estate department recommended to the council that the deal should go ahead, then the second sentence of paragraph 70.5 is false. Gayadin was told at his interview that such a recommendation would be made. But this argument is in fact raised in paragraph 70.7.

(h) The Ordinance did not allow an objector a hearing either by the municipality or by the MEC. The municipality itself chose to give Gayadin a hearing. The MEC did not. The applicant seems to assert a right to more than one hearing. The applicant lays no foundation for a right to be heard at all. The Ordinance only contemplates written objections.

(i) Gayadin keeps speaking about the "rejection of his objection" and the absence of reasons for it. That is not the question. The municipality did not have to accept or reject his objection. It had to make a decision on the best interests of the borough taking into account, *inter alia*, Gayadin's objection.

72. **Ad paragraph 71 : Unreasonable or Irrational Decision**

(a) The first respondent's position is that there is no merit at all in any of the assertions in this paragraph which run to five pages. It is not possible to answer them all except at length, which cannot be achieved here.

(b) I respectfully point out that where the deponent says that the municipality did not consider something, that is his assertion; and there is no evidence to support that proposition.

(c) The terms of this contract were very carefully negotiated at arms length. It took a long time. It is a detailed and complex arrangement. Great care was taken to ensure that the eThekwini Municipality was not deprived of its control over the planning aspects of the proposed development. The City took great care to ensure that the provisions of the contract relating especially to the claw back arrangements were sufficient, in its view, to control the extent of its contribution to the development of the film industry.

(d) It is correct that MEC Makhaye raised a number of queries about the arrangement. He was being very careful. Many of these

were solved before he became ill, and the remainder were solved when the acting MEC was appointed. Ultimately one or two adjustments had to be made to the contract to meet the requirements of the acting MEC.

(e) Final approval was only achieved in late 2004 or early in 2005 (depending on what one counts as final approval).

(f) It is inconceivable with respect, that in those circumstances a court is going to conclude that the decision of the municipality to proceed with the sale was one which no reasonable decision-maker could make, or was irrational upon any test.

(g) I should point out that this was not a case of an ordinary municipal rezoning, or something like that, which comes to the attention only of those who take the trouble to look at the formal advertisements for things like planning decisions. This was a major proposed development which achieved wide publicity. It concerned the sale of land in order to establish a film studio under the guiding hand of Mr Anant Singh, an internationally renowned producer of films. It attained wide publicity in the press. And yet only two objections were received out of a community of millions. The other objector was a property developer who was furnished

a hearing by the municipality at the same time as was Gayadin. His attitude was that he would withdraw his objection if the municipality sold him another piece of land.

(h) With regard to paragraph 71.6, the evidence before the court was that the valuations were sufficient for their intended purpose. They were put up. Nothing was hidden.

(i) The allegations in paragraph 71.11.2(c), that eThekwini had to fund the relocation costs of the defence force out of the initial price of R15 million is simply false. The deponent is aware of this. There was a suggestion that the City would assist with the department's cash flow insofar as relocation expenses were concerned. The City would not be out of pocket.

CONCLUSION

73. Insofar as prospects of success are concerned, it is respectfully submitted that the applicant enjoys no reasonable prospect of success

(a) in establishing *locus standi* (the point upon which the SCA decided the case); or, for that matter

(b) on the grounds of review it wishes to advance.

74. The first respondent's submissions on the interests of justice, which stand apart from prospects of success, have been made earlier in this affidavit.

75. I submit that it is not in the interests of justice that this litigation should be allowed to proceed further to the Constitutional Court.

76. The first respondent accordingly asks that the application for leave to appeal be dismissed with costs, including those incurred consequent upon the employment of two counsel. The first respondent asks that the application be dismissed on the papers.

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SUDHIR NANOO PRAGJEE

I HEREBY CERTIFY that the deponent has acknowledged that he/she KNOWS and understands the contents of this affidavit which was SIGNED and SWORN TO before me at on this day of 2012, the Regulations contained in Government Notice No. R1258 of the 21st July 1972 as amended by Government Notice No. R1648 of the 19th August 1977, having been complied with.

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COMMISSIONER OF OATHS