



REPORTABLE

CASE NO: SA 104/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MUNICIPAL COUNCIL OF THE MUNICIPALITY

OF WINDHOEK

Appellant

and

LADY POHAMBA PRIVATE HOSPITAL OPERATIONS

(PTY) LTD

First Respondent

ENVIRONMENTAL COMMISSIONER OF NAMIBIA

Second Respondent

MINISTER OF HEALTH AND SOCIAL SERVICES

Third Respondent

ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA

Fourth Respondent

Coram: SHIVUTE CJ, MAINGA JA and MAKARAU AJA

Heard: 3 March 2025

Delivered: 13 June 2025

Summary: In August 2011, the Municipal Council of the Municipality of Windhoek (Council) adopted a resolution to the effect that it would establish a central health care risk waste treatment facility that would be the only approved treatment facility of such waste in Windhoek.

Though the resolution was adopted in August 2011, Council's treatment facility only started operations in 2018. Lady Pohamba Private Hospital (the hospital) had, since

2018, been making use of Council's facility for the treatment of the health care risk waste generated by it. This was the case until 2020. In April 2020, the hospital ordered a waste management system known as Sterilwave 250 series (the treatment system) which was delivered and installed in July 2020.

The hospital obtained an environmental clearance certificate from the Environmental Commissioner as well as approval from the Ministry of Health and Social Services to use its treatment system. Since the installation of the treatment system, the hospital ceased making use of Council's treatment facility and started using its own. When Council became aware of this change, it wrote to the hospital in a letter dated 6 August 2020. In that letter, Council informed the hospital that it was not complying with regs 35(1)(h), 37(2)(a) and (b) of the Waste Management Regulations¹ (the regulations). Council further informed the hospital that should it wish to treat the health care risk waste it generated, the hospital should consult Council and provide it with relevant information for Council to determine whether the manner and method employed by the hospital would warrant an approval for such treatment or disposal of health care risk waste.

On 9 October 2020, the hospital applied to Council in terms of reg 35(2) of the regulations for permission to operate its treatment system. On 6 November 2020, the application was declined. Aggrieved by this outcome, the hospital applied to the High Court to review and set aside the Council's decision and to declare the thing produced after the treatment of its health care risk waste, as non-hazardous waste. The High Court, declined to make a finding on the declaratory relief sought, but set aside Council's decision and referred the matter back to Council for reconsideration of the hospital's application.

Council then appealed to this Court against the judgment and order of the High Court.

Held that, reg 35(2)(a) provides that an application may be made to Council for permission to ' . . . handle, store and otherwise deal with their health care risk waste in a manner different from the requirements set out in subregulation (1) . . . '. Regulation 35(1) does not in any way deal with the treatment or disposal of health care risk waste. It refers to and sets out different ways health care risk waste generators must handle

¹ Windhoek Municipality: Waste Management Regulations, GG 4650, GN 21 of 15 February 2011.

or store their health care risk waste. Therefore, literally interpreted 'and otherwise deal with . . . in a manner different from . . . subregulation 1' means that a health care risk waste generator may apply to Council for permission to store or handle its generated health care risk waste in a manner different from the list of ways it may be handled and stored in terms of reg 35(1).

Held that, reg 35(1)(h), provides that health care risk waste generators must 'make arrangements, as soon as possible, for the collection, treatment or disposal of health care risk waste from their premises to a Council approved disposal site by a waste contractor'. The word 'arrangement' is defined as 'a plan for a future event'. The literal interpretation is therefore that a health care risk waste generator must make a plan as soon as possible for the collection, treatment and disposal of such waste. Essentially, they should not keep the waste for long and should ensure it is collected and transported for treatment at a Council approved treatment facility.

Held that, Council's 6 November 2020 decision was not unreasonable, irrational or *ultra vires* reg 35(3).

Held that, absent a challenge to the validity of the resolution of August 2011, the court a quo ought not to have made a finding on the validity or otherwise of that resolution. In any event, though it found the resolution to be invalid, the court did not set it aside. Therefore, even if the resolution of August 2011 was impugnable, it still stood and could not simply have been disregarded. The resolution of August 2011 exists as a matter of fact and cannot simply be wished away or ignored.

Held that, Council's decision of 6 November 2020, which was based on the August 2011 decision remains valid because it is based on a previous decision which still existed.

Held further that, as Council's experts effectively put in doubt the adequacy of the methodology employed by the hospital's expert(s) in determining that the 'thing' is non-hazardous, a genuine dispute of fact had arisen which called for an application for referral to oral evidence on that limited issue. That was not done and *Plascon-Evans* dictates that the court should in such circumstances accept the version of the

respondent, which in this case was Council. The declaratory relief should therefore be dismissed with costs.

Consequently, the appeal was upheld with costs and the cross - appeal dismissed with costs.

APPEAL JUDGMENT

SHIVUTE CJ (MAINGA JA and MAKARAU AJA concurring):

Introduction

[1] This is an appeal at the instance of the appellant against the judgment and the following orders of the High Court:

- ‘1. The decision taken by the first respondent dated 6 November 2020 disallowing the applicant from utilising the ‘Sterilwave 250 Series’ medical waste management system is hereby reviewed and set aside.
2. The matter is referred back to the first respondent, to reconsider and decide upon.
3. The first respondent is directed to pay the applicant's costs of suit, such costs to include the costs of one instructing and two instructed counsel.
4. The matter is regarded as finalised and removed from the roll.’

[2] The protagonists in this appeal are the appellant, the Municipal Council of the Municipality of Windhoek (Council) and the first respondent, the Lady Pohamba Private Hospital Operations (Pty) Ltd (the hospital). The other respondents are merely cited for any interest they may have had in the outcome of this matter.

Background – proceedings a quo

[3] The following facts are common cause between the parties: In August 2011, Council adopted a resolution to the effect that it would establish a central health care risk waste treatment facility that would be the only approved treatment facility of such waste in Windhoek.

[4] Though the resolution was adopted in August 2011, Council's treatment facility only started operations in 2018. The hospital had, since 2018, been making use of Council's facility for the treatment of the health care risk waste generated by it. This was the case until 2020.

[5] In April 2020, the hospital ordered a waste management system known as Sterilwave 250 series (the treatment system) which was delivered and installed in July 2020. The hospital obtained an environmental clearance certificate from the Environmental Commissioner as well as approval from the Ministry of Health and Social Services to use its treatment system.

[6] Since the installation of the system, the hospital ceased making use of Council's treatment facility and started using its own. When Council became aware of this change, it wrote a letter dated 6 August 2020 to the hospital. In that letter, Council informed the hospital that it was not complying with regs 35(1)(h), 37(2)(a) and (b) of the Waste Management Regulations² (the regulations). Council further informed the hospital that should it wish to treat the health care risk waste it generated, the hospital should consult Council and provide it with relevant information for Council to determine whether the manner and method employed by the hospital would warrant an approval for such treatment or disposal of health care risk waste.

² Windhoek Municipality: Waste Management Regulations, GG 4650, GN 21 of 15 February 2011.

[7] On 9 October 2020, the hospital applied to Council in terms of reg 35(2) of the regulations for permission to operate its treatment system.

[8] On 6 November 2020, Council refused the application and gave the following reasons which I find necessary to set out in full:

- '1. The City of Windhoek (COW) as one of its core mandates is tasked with the responsibility to ensure that all waste generated within its jurisdiction is managed optimally and therefore has the legal mandate to ensure all waste is safely disposed in the manner as prescribed and approved by Council.
2. The Waste Management Regulations 16 of 2011 under 2(7)(g) states that Council may determine the manner and place in which any waste must be stored, contained, handled, collected, treated, disposed or otherwise dealt with.
3. During 2009, the COW took a multi-sectoral approach in the development of healthcare risk waste strategy as both internal and external stakeholders participated in the development of this strategy. This strategy therefore paves the way of how such waste will be managed within the City. External stakeholders that participated in the development process were from major healthcare providers (hospitals) amongst others at the time.
4. One of the recommendations that came from the strategy formulation process was for a treatment technology based on the amount and types of waste requiring treatment and placed the responsibility on the COW to establish and provide such a facility. The strategy therefore further proposed that a central treatment facility be established and managed by the COW, COW was not in favour of individual small treatment facilities at various healthcare facilities.
5. Based on these recommendations Council has made the following resolution amongst others on the strategy:

That the Strategic Executive: Infrastructure, Water, and Waste Management be given the mandate to prevent the establishment of small treatment facilities at various healthcare facilities within Windhoek and that the facility established by the COW be the approved facility for the treatment of healthcare risk waste.

6. Several consultative workshops were held with the healthcare waste risk industry specifically generators and transporters during the course of 2017 and 2018, during the establishment and commissioning phase of the healthcare risk waste treatment facility of the COW. At these consultative workshops Lady Pohamba Hospital as a stakeholder was also invited and attended; and the above resolution that no other treatment facilities at various healthcare facilities within Windhoek would be permitted/established was equally well known.
7. The healthcare risk waste treatment facility of the COW at present still has ample capacity to receive and treat healthcare risk waste from its boundaries for the foreseeable future and thus from a technical and operational view, there exists no justification to support the approval of smaller treatment facilities at various healthcare facilities.
8. Therefore your application for approval to operate a Sterilwave SW250 Series medical waste treatment technology at your premises is denied, as the City is not in agreement that individual facilities be erected in line with its healthcare risk waste strategy. Hence the healthcare risk waste facility of the COW remains the only approved facility and the City calls on you in this regard to continue utilising the current facility.' (Emphasis provided).

[9] The resolution referred to in Council's decision of 6 November 2020 was the resolution of August 2011 which was attached to the founding affidavit deposed in support of the hospital's application a quo.

[10] Aggrieved by the outcome of its application, the hospital applied for the review of Council's decision, seeking the following substantive orders as recorded in the supplementary notice of motion –

'...

1. Calling upon [Council] to show cause why:

- 1.1 The decision taken by [Council] on or before 6 November 2020 to the effect that the [hospital] should not use the Sterilwave SW250 series medical waste

management system, should not be reviewed and corrected or set aside in terms of rule 76(1);

1.2 Declaring that the substance/thing which exists after the [hospital] has treated its healthcare risk waste with its Sterilwave Machine does not constitute hazardous waste or healthcare risk waste as defined in the Windhoek Municipality: Waste Management Regulations (GG 4650 of 15 February 2011) made under the Local Authorities Act No. 23 of 1992;

1.3 The respondents should not be ordered to pay the costs of this application in the event of opposing the application, such costs to include the costs of one instructing and two instructed counsel.'

Versions of the parties in the court a quo

[11] As regards the first prayer, the hospital argued that the decision to refuse its application was unreasonable, irrational and *ultra vires*. The hospital contended that reg 35(2) provides that waste generators may have the right to apply in writing for permission to (a) handle, store and otherwise deal with their health care risk waste in a manner different from the one approved by Council or (b) transport and deliver their health care risk waste for purposes of treatment or disposal in terms of the regulations.

[12] That in considering an application in terms of reg 35(2), Council was required to exercise a discretion by examining the manner and method sought to be used in the treatment of waste by an applicant. It was averred that Council's centralisation policy of the health care risk waste management treatment facility was contrary to such discretion. Therefore, the centralisation was *ultra vires* Council's mandate in terms of reg 35(3). As the refusal of the hospital's application was not based on the ground that the method employed by the hospital's treatment system was not in compliance with the required standards, such refusal is unreasonable, unfair and *ultra vires*.

[13] As regards the declaratory order sought, the hospital introduced expert evidence of one Ms Engelbrecht to the effect that the 'thing' or final product after the treatment by its system of the health care risk waste is non-hazardous waste. On the strength of this evidence, the hospital argued that, the 'thing' or final product must therefore be treated as general waste. The reason for seeking the declaratory order was explained in the hospital's replying affidavit. It was explained that, should the thing or final product be declared to be non-hazardous, Council would not be justified in charging the hospital the rates applicable to the disposal of hazardous waste, but rather only on those applicable to the disposal of general waste.

[14] The hospital also produced an affidavit deposed to by Mr Lorecki, the inventor of the hospital's treatment system who in essence confirmed what Ms Engelbrecht stated in her supplementary affidavit. It is to be noted here that the deponent to the hospital's supplementary founding affidavit did not attach the 'letter' of Mr Lorecki, neither is same identified as an annexure in the supplementary founding affidavit. However, same is part of the appeal record.

[15] It was on the basis of the evidence by its experts that the hospital sought a declaratory order to the effect that the 'thing' produced after the treatment of the health care risk waste in its treatment system was non-hazardous general waste.

[16] In opposition to the hospital's application, Council averred that s 94(1)(c) of the Local Authorities Act 23 of 1992 (the Act) authorised Council, after consultation with the Minister, to make regulations by notice in the *Gazette* in relation to 'the provision, regulation and control for the removal or disposal of night soil, refuse, slop water, garden and stable litter and otherwise offensive or unhealthy matter'. Council therefore promulgated the regulations pursuant to that provision.

[17] It was stated that after consultations with both internal and external stakeholders in 2008/2009, Council resolved that the health care risk waste treatment and disposal be centralised. In light of that resolution, Council constructed a centralised health care risk waste treatment facility, which started its operations in 2018. In August 2020, Council became aware of the fact that the hospital was treating its own health care risk waste.

[18] After exchanges between the parties, the hospital applied for permission to treat its health care risk waste. The application was made in terms of reg 35(2). Council refused the application and based its decision on its resolution of August 2011. In response to the averment by the hospital that Council fettered its discretion through the adoption of its resolution of August 2011, Council contended that reg 35(2) properly construed did not authorise it to grant permission to a health care risk waste generator to treat such waste. It was further averred that the phrase 'and otherwise deal with' in reg 35(2) was limited to the handling, storing, transporting and delivering of health care risk waste and not the treatment thereof.

[19] As regards the resolution of August 2011, it was asserted that the validity of the resolution was not challenged in the court a quo and therefore stood.

[20] On the contention that the hospital had obtained an environmental clearance certificate, it was counter-argued that the awarding of such certificate did not change the nature of the waste in question from hazardous to non-hazardous.

[21] The deponent also denied that the regulations were *ultra vires* the Act and contended that they were in fact made in terms of the Act.

[22] It was also denied that the refusal of the application was unreasonable, irrational or *ultra vires*. This, it was averred, was because Council, relied for its decision on the resolution of August 2011, which resolution remained valid.

[23] As regards the expert evidence or opinions, it was argued that two of the Council's experts found that the hospital's treatment system was not suitable and was incapable of treating health care risk waste. One of the Council's experts found that the tests conducted by Ms Engelbrecht were wholly inadequate to determine whether the 'thing' produced after the treatment of the relevant waste in the hospital's system is hazardous or not. Council's second expert also discounted the finding by the hospital's expert(s) that the 'thing' is non-hazardous.

[24] In reply, the deponent to the hospital's founding affidavit averred that the August 2011 resolution was challenged in para 35 of the initial founding affidavit as well as para 21 of the hospital's supplementary founding affidavit. In any event, it was averred that the resolution of August 2011 was subject to the regulations. Therefore, the resolution did not prevent Council from granting the required permission. Contrary to its earlier version that the resolution of August 2011 fettered Council's discretion, in reply, the hospital averred that the resolution merely urged the Strategic Executive to take preventative steps, 'but the resolution itself does not amend the regulations or remove Council's discretion to grant exemption'.

[25] It was averred that in the event it was found that the resolution prevented Council from granting the hospital's application, an unlawful administrative decision existed in fact and not in law. Therefore, its mere existence could not provide the foundation for the legality of a later decision or act. Furthermore, it was argued that,

the existence of the August 2011 resolution was the reason the court could 'not refer the matter back to the Council, and there is no requirement to formally set it aside'.

[26] In respect of reg 35(2), it was averred in reply that the phrase 'otherwise deal with' in reg 35(2) meant the treatment at a facility different from the Council's facility. Therefore, so it was further contended, reg 35(2) conferred powers on Council to grant or refuse an application for permission to treat health care risk waste.

Judgment a quo

[27] The court a quo made the following pertinent findings which form the basis of this appeal. The court interpreted the phrase 'and otherwise deal with' in reg 35(2) to mean that generators of health care risk waste could apply to Council for permission to otherwise deal with its health care risk waste, whether it was the treatment, transportation, disposal or other management of the health care risk waste. On the strength of this interpretation, the court below found that Council's refusal of the hospital's application on the basis that it did not have the power to grant an application to treat such waste in terms of reg 35(2), goes against the discretionary power and responsibility placed upon it by the regulations. The court further found that Council divested itself or fettered its own discretion with the resolution of August 2011.

[28] The court held that the resolution of August 2011 was not before it. This is so because, the August 2011 resolution was merely attached to the founding affidavit and was not challenged in court. The court also pointed out that Council conceded that it fettered its discretion with the August 2011 resolution. However, each of the parties was of the view that the other must apply for its setting aside. The court held that it was incumbent upon each party to apply to have the August 2011 resolution set aside,

but that as there was no application to set it aside, the court could not set it aside *mero motu*.

[29] On the question of whether on authority of *Oudekraal*³, Council may use its earlier 'unlawful' resolution to justify a later 'unlawful' decision, the Court found in the negative. It held that the decision of 6 November 2020 was patently wrong and that there was no application of the mind in circumstances where that was required. It also held that Council breached Art 18 of the Namibian Constitution when it failed to apply its mind to the application. As such, so it found, it could not overlook that breach on the basis that the 6 November 2020 decision was premised on another decision which remained valid. The court relied on *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO & others*⁴ for this finding. It found that because Council relied on its earlier invalid resolution to justify the decision of 6 November 2020, in the exercise of its discretion in terms of Art 18, the court would set aside the 6 November 2020 decision as Council did not apply its mind. The court a quo then declined to make the declaratory order. It further ordered Council to pay the hospital's costs.

[30] Aggrieved by this outcome, Council has appealed to this Court. It is to that appeal that the next part of the judgment now turns.

Appeal proceedings

Notice of appeal

[31] Council has raised four broad grounds of appeal which may be summarised as follows:

- (a) the court a quo erred in its interpretation of reg 35(2);

³ *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2010 (1) SA 333 (SCA).

⁴ *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO & others* 2020 (4) SA 375.

- (b) the court a quo erred in finding that Council divested itself of discretion through the adoption of the August 2011 resolution;
- (c) the court a quo failed to consider that administrative decisions are presumed to be valid until declared otherwise by a court of law; and
- (d) the court a quo erred in granting a costs order against Council.

[32] The hospital has cross appealed, seeking the declaratory relief that the substance that remains after the hospital has treated its health care risk waste did not constitute hazardous waste as defined in the regulations. It will be recalled that the High Court declined to decide this prayer.

Parties' submissions on appeal

[33] Prior to delving into the analysis of the grounds of appeal, it is apposite to briefly consider the parties' submissions in this Court.

Council's submissions

[34] The legal practitioner for Council submitted that in terms of s 94(1)(c) of the Act, Council is given power to make regulations by notice in the *Gazette* to provide for, regulate and control the removal or disposal of inter alia health care risk waste. To this end, it promulgated the regulations.

[35] Regulation 2 obliges Council to ensure that all waste generated, stored, collected, transported, treated and disposed of within its municipal area is managed properly and in a manner not posing a threat to human health or the environment.

Regulation 36 deals with the collection of health care risk waste. Regulation 37(2) provides that health care risk waste may only be disposed of by a person in accordance with the provisions of reg 20 or at any other place set aside or approved by Council and such disposal may only take place in the manner approved by Council.

[36] In light of the mandate bestowed upon it by the regulations, Council on 31 August 2011 resolved, with the consent of the stakeholders involved to, amongst others, establish a centralised health care risk waste treatment facility and to authorise its Strategic Executive: Infrastructure, Water and Waste Management to prevent the establishment of small treatment facilities at various health care facilities within Windhoek.

[37] On the first ground of appeal, namely that the court a quo erred in interpreting reg 35(2), it was argued that that court failed to give a purposeful and contextual interpretation to the regulation.

[38] It was Council's submission further on this point that the court a quo's interpretation of reg 35(2), particularly the phrase 'and otherwise deal with' was incorrect as reg 35 did not authorise Council to permit generators of health care risk waste to treat their generated waste. The correct interpretation, it was so submitted, is that 'otherwise deal with', refers to other methods of handling or storing health care risk waste other than the methods set out in reg 35(1).

[39] It was further submitted that the words 'treatment' and 'disposal' of waste 'are used conjunctively' and the treatment or disposal of health care risk waste may only be authorised in terms of reg 20 and reg 37 and not pursuant to reg 35(2). Authorisation may be granted but only if an application is brought in terms of the correct regulation.

[40] On the second ground of appeal, counsel argued that the court a quo erred in finding essentially that Council's 6 November 2020 decision declining the hospital's application was invalid as it was based on an earlier allegedly invalid resolution. It was submitted that the court a quo erred in so holding because the validity of the August 2011 resolution was not impugned before it and was therefore not ripe for consideration.

[41] It was contended that the August 2011 resolution was in existence as a fact. The validity of the 6 November 2020 decision was dependent on the factual existence of the August 2011 resolution. Therefore, the November 2020 decision stood as long as the August 2011 resolution remained in existence. All the court below could do was to ascertain whether the August 2011 resolution existed. Since that decision was not challenged, the court could only accept the validity of the subsequent decision based on the existence of the earlier decision.

[42] On the third ground of appeal, it was argued that the August 2011 resolution was an administrative decision which in terms of the *Oudekraal* rule was presumed to be valid until declared otherwise by a competent court and the court a quo should therefore not have interfered with such decision in the absence of a direct challenge to its validity.

[43] In respect of the hospital's cross-appeal, it was submitted that the averments made by the hospital's expert(s) were gainsaid by two of the Council's experts. A genuine dispute of fact arose on the question of whether the methodology employed by the hospital's expert(s) was adequate. Based on the *Plascon-Evans*⁵ rule, so it was

⁵ *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

submitted, the version of Council (as the respondent a quo) must be accepted. Therefore, the declaratory relief was correctly refused. In any event, it was further submitted that the hospital did not challenge the court a quo's decision to refer the matter back to Council. Therefore it cannot challenge that court's decision declining the grant of a declarator that the 'thing' produced after the treatment of the health care risk waste by its system was not hazardous.

The hospital's submissions

[44] The hospital filed a condonation application for the late filing of security. It submitted that the cross-appeal did not suspend the operation of any order and therefore no bond of security was required. The cross-appeal was filed out of an abundance of caution. It may very well not have been necessary as the declaratory relief could still be canvassed under Council's appeal.

[45] In a letter to the hospital in August 2020, Council indicated that it would consider a request by the hospital for permission to treat health care risk waste at its premises, if an application is made to it. It was submitted that this decision, which was communicated to the hospital, replaced the resolution of August 2011. Therefore, the decision that stood is the decision to consider an application, if brought, and not the August 2011 resolution. I interpose and observe that this is a new point raised for the first time in the hospital's heads of argument. The entire case a quo was premised on the common cause fact that the earlier decision (whether invalid or not) was Council's resolution of August 2011.

[46] The hospital then applied in terms of reg 35(2) for permission to treat health care risk waste at its premises using its treatment system. In the application, the

hospital explained that once it had treated the health care risk waste, the 'thing' remaining after treatment was non-hazardous general waste which could be collected by an accredited waste disposal operator.

[47] Council refused the hospital's application and in doing so relied on its August 2011 resolution, which confined treatment of health care risk waste in Windhoek to Council's facility. The resolution of August 2011, so it was submitted, fettered Council's discretion.

[48] Council's refusal to grant the application was not premised on reg 35(2). It was premised firstly, on the fact that by virtue of its August 2011 resolution only Council's treatment facility was approved for treatment of health care risk waste and secondly, on the contention that Council's treatment facility still had capacity to meet the city's demands.

[49] During oral submissions, counsel for the hospital conceded as regards the cross-appeal that *Plascon-Evans* was not in his client's favour. However, it was submitted that because the versions of Council's two experts consisted of bald or untenable denials or raised fictitious disputes of fact, this Court would be justified in rejecting the allegations of Council's experts on the papers alone. It was submitted that, Council's experts did not themselves conduct any tests.

[50] Regarding the first ground of appeal, it was submitted that reg 35(2) was clear and unambiguous. Therefore, an ordinary, literal or grammatical interpretation of the phrase 'and otherwise deal with' should be resorted to in interpreting the regulation. It was submitted further that the court a quo's interpretation of that phrase is correct. As reg 35(2) makes provision for health care risk waste generators to make arrangements

for the treatment and disposal of such waste in a different manner, one such manner contemplated in the regulation could be on-site treatment by generators of such waste.

[51] On the second ground of appeal, it was contended that an invalid action or decision is a nullity and could not be legally enforceable in any court of law when it has factual existence which may bring legal consequences.

[52] It is further submitted that *Oudekraal* is not authority for the proposition that an administrative body or official may rely on its own former illegal decision as a defence to a review application in respect of its subsequent decision. Further that the refusal of the application in November 2020 was *ultra vires* as it was not made in terms of the regulations.

[53] It is further submitted that the decision of August 2011 was *ultra vires* the regulations and all decisions taken in terms of the invalid August 2011 resolution will stand, unless Council instituted self-review proceedings.

[54] As regards the third ground of appeal, it was submitted that the August 2011 resolution was before court and Council relied on it as basis for its November 2020 decision. It was therefore not entirely correct that the court a quo went on a 'frolic' when it made a finding on the validity of that resolution.

Legal landscape and disposal

[55] The disposal of the appeal will be considered under the following broad headings:

- (a) Interpretation of reg 35;

- (b) *Oudekraal* rule and findings in respect of the August 2011 resolution;
- (c) The cross-appeal; and
- (d) Costs.

Interpretation of reg 35

[56] Regulation 35 reads:

'Duties of generators of health care risk waste

35.(1) The generator of health care risk waste or the owner or occupier of premises on which health care risk waste is generated must –

- (a) handle and store health care risk waste in a manner that does not pose a threat to human health or the environment;
- (b) separate health care risk waste from all other waste at the point at which it is generated;
- (c) store health care risk waste in a Council approved or stipulated leak-proof, sealable containers or receptacles and ensure that containers or receptacles which are used for the storage of sharps and other clinical items which can cause cuts, punctures or injections are, in addition, rigid and puncture-resistant;
- (d) label health care risk waste containers or receptacles in large, legible lettering with
 - (i) the name and address of the generator;
 - (ii) the words "Danger: Health Care Risk Waste" and "Gevaar: Mediese Afval", and the international bio-hazard logo; and
 - (iii) the date on which the containers or receptacles are removed from the generator's premises;

- (e) prevent public access to health care risk waste containers or receptacles which are in use;
- (f) store filled health care risk waste containers or receptacles in controlled, secure areas which are reserved for the storage of health care risk waste;
- (g) provide for proper cooling facilities within which health care risk waste is stored while awaiting collection for treatment or disposal, and which cooling facilities must comply with any standard publication adopted by the Council in terms of section 94B of the Act; and
- (h) make arrangements, as soon as possible, for the collection, treatment or disposal of health care risk waste from their premises to a Council approved disposal site by a waste contractor.

2. Subject to the provisions of these regulations and any other applicable law generators of health care risk waste may apply in writing to the Council for permission to

- (a) handle, store and otherwise deal with their health care risk waste in a manner different from the requirements set out in subregulation (1); or
- (b) transport and deliver their health care risk waste for purposes of treatment or disposal in terms of these regulations.

3. The Council may in writing grant the permission referred to in subregulation (2) and may impose conditions.

....'

[57] Regulation 35(2)(a) provides that an application may be made to Council for permission to '... handle, store and otherwise deal with their health care risk waste in a manner different from the requirements set out in subregulation (1)...'. Regulation 35(1), does not in any way deal with the treatment or disposal of health care risk waste. It refers to and sets out different ways health care risk waste generators must handle or store their health care risk waste. Therefore, literally interpreted 'and

otherwise deal with . . . in a manner different from . . . subregulation 1' means that a health care risk waste generator may apply to Council for permission to store or handle its generated health care risk waste in a manner different from the list of ways same may be handled and stored in terms of reg 35(1).

[58] As regards reg 35(1)(h), it provides that health care risk waste generators must 'make arrangements, as soon as possible, for the collection, treatment or disposal of health care risk waste from their premises to a Council approved disposal site by a waste contractor'. The word 'arrangement' is defined as 'a plan for a future event'⁶. The literal interpretation is therefore that a health risk waste generator must make a plan as soon as possible for the collection, treatment and disposal of such waste. Essentially, such generator should not keep the waste for long and should ensure it is collected and transported for treatment at a Council approved treatment facility. This interpretation aligns with what is provided in sub-reg (4).

[59] Sub-regulation (4) provides that –

'Generators of health care risk waste must

- (a) maintain an up-to-date written record of health care risk waste removed from their premises in a form determined from time to time by the Council;
- (b) acquire from the disposer of the health care risk waste written notification that such waste has been treated or disposed of and, on receiving such notification, indicate in their written records that such waste has been treated and disposed of accordingly;
- (c) and keep the written record referred to in paragraph (a) and the notification referred to in paragraph (b) for a period of five years after the removal from their premises of such health care risk waste.' (Added emphasis).

⁶ Soanes and Stevenson (ed) *Concise Oxford English Dictionary* (5 ed revised), p 72.

[60] Sub-regulation (4), provides that generators of such waste must maintain written records of the health care risk waste removed from their premises. If reg 35(2) pertained to the treatment by generators of health care risk waste, then there would have been no need for the waste to be removed from the premises of the generators of such waste. Further, sub-reg (4) would also not have required that the generators of such waste acquire from the disposer written notification that such waste had been treated.

[61] In light of the fact that health care risk waste is defined as hazardous waste, provision is made in reg 35(2) for an application to be made to Council to authorise generators of health care risk waste to handle and/or store and/or transport such waste for treatment in a manner different from that set out in reg 35(1).

[62] In terms of reg 35(3), Council may in writing grant the permission, subject to conditions. Then in reg 35(4), provision is made for maintaining records of the waste removed from the generator's premises for treatment, records of written notification that such waste was indeed treated, and the generators of such waste are then obliged to keep such records for five years.

[63] This Court in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors*⁷ explained that:

‘. . . Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production . . . A sensible meaning is to be

⁷ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* 2015 (3) NR 733 (SC).

preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document . . .'.⁸

[64] 'Health care risk waste' is defined in reg 1 as meaning

'hazardous waste generated at any health care facility such as a hospital, clinic, laboratory, medical research institution, dental or medical practitioner or veterinarian'.⁹

'Hazardous waste' in turn is defined as –

'(a) waste containing, or contaminated by, poison, any corrosive agent, any flammable substance having an open flash-point of less than 90 degree Celsius, an explosive, radioactive material, any chemical or any other waste that has the potential even in low concentrations to have a significant adverse effect on public health or the environment because of its inherent toxicological, chemical and physical characteristics;

(b) the carcass of a dead animal;

(c) and any other waste which may be declared as such by Council or in terms of any other applicable law,

but excludes household hazardous waste'.¹⁰

[65] Considering, the nature of the waste concerned, the duty of Council in terms s 94(1)(c) of the Act, the importance of such waste being stored, transported and treated under the watchful eye of Council and taking into account the above interpretation of reg 35, the court a quo's interpretation of reg 35, with respect, was unbusinesslike. The words of reg 35 are plain and unambiguous and should be given their literal interpretation in line with the ordinary rules of grammar and syntax and considering the context of reg 35 in light of the purpose for which reg 35 was enacted.

⁸ Ibid, para 18.

⁹ Regulation 1 of the Regulations.

¹⁰ Ibid.

[66] It would seem it matters not whether the resolution of August 2011 exists or not nor that Council refused the hospital's application based on that resolution. Even if Council were to determine the hospital's application only in terms of reg 35, Council's refusal would still stand as that regulation does not confer upon it the power to permit health care risk waste generators to treat such waste. The permission it may give in terms of that regulation, pertains solely to the storage and handling of the health care risk waste in a manner different from the various ways set out in reg 35(1). It can therefore not be accepted as a correct proposition, that Council's 6 November 2020 decision was unreasonable, irrational or *ultra vires* reg 35(3).

[67] In terms of the literal rule of interpretation of statutes, the language in a document is to be given its ordinary and grammatical meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.¹¹

[68] The interpretation given above, does not lead to absurdity, repugnancy or inconsistency. The court a quo's interpretation on the other hand, is likely to result in a situation whereby Council will have to grant permission to health care risk waste generators to treat their waste in terms of reg 35(2), when that regulation does not afford Council such power. In terms of what regulation will generators of such waste, who for whatever reason are unable to store, handle or transport that waste in the ways set out in reg 35(1) apply for permission to employ such alternative methods for storing, handling or transporting such waste?

¹¹ *Erongo Regional Council & others v Wlotzbaken Home Owners Association & another* 2009 (1) NR 252 (SC) para 31.

[69] This, ordinarily should be the end of the matter. I will however proceed to consider the court a quo's findings in respect of the August 2011 resolution, to demonstrate that even on that score, the court a quo's findings cannot be supported.

Oudekraal rule and findings in respect of the August 2011 resolution

[70] The court found that the August 2011 resolution was invalid, because it fettered the discretion of Council, which resulted in Council not applying its mind to the application. The court further held that Council breached Art 18 because it failed to apply its mind to the application of the hospital.

[71] While Council relied on the August 2011 resolution to refuse the application, it also informed the hospital that Council's treatment facility still had ample capacity to receive and treat health care risk waste from generators of such waste in Windhoek for the foreseeable future. Council could not have communicated this decision, unless it considered whether the load on its treatment facility was so much that it would be justified to permit a different treatment facility to come into existence. This shows that Council applied its mind to the application. That it applied its mind and exercised its discretion, albeit against the hospital, is clear from the decision of November 2020. Having found as I did, I am of the considered view that Art 18 was not breached. For these reasons, I am of the considered view that the court a quo erred when it found that Council did not apply its mind.

[72] Interestingly, the deponent to the hospital's replying affidavit averred that the resolution of August 2011 did not remove Council's discretion to grant exemption. In any event, whether the August 2011 decision fettered Council's discretion or not was not something that that court was called upon to determine as such a determination could only arise in circumstances where that resolution was challenged. It was

therefore not open to that court to make findings of validity or invalidity of that resolution.

[73] It must be mentioned here that, elsewhere in the hospital's papers, it is averred that Council kept on reminding the hospital that it had committed an offence in terms of the regulation when it treated health care risk waste without Council's approval. This could be regarded as coercive conduct which would have justified a collateral challenge but even in the wake of that window of opportunity, the hospital opted not to challenge the August 2011 resolution.¹² This brings me to the issue of *Oudekraal*.

Oudekraal rule and findings in respect of the August 2011 Resolution

[74] Even on the assumption that the resolution of August 2011 fettered Council's discretion, the decision of the court a quo cannot stand. This will be demonstrated in the next few paragraphs.

[75] The facts and key findings in *Oudekraal*¹³ and *Kirland*¹⁴ were neatly summarised in *Merafong City v Anglogold Ashanti Ltd* 2017 (2) SA 211 (CC), and I find it convenient to borrow from that summary. The court stated as follows:

'[39] In *Oudekraal* a provincial executive officer, the Administrator, had granted Oudekraal township-development rights. That was in 1957, more than 40 years before the dispute. Now Oudekraal asked the City Council to approve its engineering-services plan for the township. The City Council refused. It said the Administrator's approval, decades back, was bad for lack of compliance with the provincial law under which it was granted. Was the City Council entitled to refuse approval because the underlying grant of development rights was bad? The High Court said Yes. The Supreme Court of Appeal said No. The City Council could not simply treat the Administrator's act as

¹² C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed, p 765.

¹³ *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2010 (1) SA 333 (SCA).

¹⁴ *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC).

though it did not exist. Until it was properly set aside by a court of law, the approval engendered legal consequences. The court however refused Oudekraal the declaratory relief it sought. This was because the approval was vulnerable to being set aside in proceedings properly brought for judicial review, and that had to be done first.

[40] In *Kirland* an official had refused an authorisation Kirland sought, but, before that decision was communicated, an acting stand-in, in dubious circumstances, granted the permission. The question was whether the Department of Health, Eastern Cape (Department), knowing the grant was dubious, could treat it as non-existent. This court, applying *Oudekraal*, said No. Doing so affected Kirland's rights. Even though the second decision (which was communicated first) might be defective, government should generally not be exempt from the forms and processes of review. It could not take a shortcut across Kirland's legal and constitutional protections. Kirland may have acted to its detriment in reliance on the second decision. It would be unfair to Kirland to allow government to ignore the decision. In addition, government in bringing proceedings to set aside the suspect decision would have to explain its dilly-dallying, which suggested acquiescence. It therefore had to apply formally for a court to set aside the defective decision, so that a court could properly consider its effects on those subject to it, as well as the Department's delay in making the challenge.' (The emphasis is mine.)

[76] The Constitutional Court of South Africa in *Merafong City*¹⁵ explained that the import of *Oudekraal* and *Kirland* is that an apparently binding administrative decision cannot simply be ignored on the basis that it is invalid. The validity of such decision must be tested in appropriate proceedings and that the power to decide the validity or otherwise of such a decision lies with the court. It is trite that unless set aside, such decision stands.

[77] The Constitutional Court further explained that the *Oudekraal* principle does not render an impugnable decision or action indefinitely valid. What the rule does, for rule of law reasons, is to temporarily place a brake on the determination of the validity of the decision or action, until it is challenged in an appropriate forum. The rationale

¹⁵ *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) para 41.

seems to prevent every Tom, Dick and Harry from judging a particular decision as invalid thereby creating an uncertainty about the binding nature of such decision. That situation would create chaos and uncertainty. Therefore, until the allegedly unlawful administrative action or decision is challenged in the appropriate forum, that decision, however undesirable it may seem, should stand.¹⁶

[78] The court further noted that both *Oudekraal* and *Kirland* recognised that there may be instances where an administrative action or decision could be regarded as invalid even where no action had been taken to set it aside. However in both matters the courts did not indicate what circumstances would justify this exception to the rule. In the matter presently serving before this Court, no such circumstances are alleged or are apparent.

[79] Having considered the above principles, I am of the considered view that absent a challenge to the validity of the resolution of August 2011, the court a quo ought not to have made a finding on the validity or otherwise of that resolution. In any event, though it found the resolution to be invalid, the court did not set it aside. Therefore, even if the resolution of August 2011 was impugnable, it still stood and could not simply have been disregarded. The resolution of August 2011 exists as a matter of fact and cannot simply be wished away or ignored. The court a quo correctly, in my considered view, therefore found that any one of the parties could apply to have the resolution set aside, particularly in light of Council's concession that the resolution fettered its discretion.

[80] This option appears still to be available to the parties, although I must caution as it was done in *Kirland*, that such an application would not be had for the asking. The Art 18 requirements for reviewing administrative decisions would have to be satisfied

¹⁶ Ibid para 43.

and whichever party attempts this task must be prepared to explain the delay in bringing the application within a reasonable time. This will particularly be a demanding burden as both protagonists have been aware of this possibility, at least since the decision of November 2020. That however, is a hurdle the parties must reconcile themselves with and cross should they be so advised or minded to pursue that route.

[81] What I find curious is that, the hospital having had sight of the resolution and knowing what it provides has simply not challenged that resolution. In fact, when Council said that one of the reasons the application was refused was because of that resolution, there and then the hospital could have elected to challenge the resolution as well as the November 2020 decision. It cannot now bemoan the effects of that election.

[82] The court a quo erred in making a finding of invalidity in respect of the resolution which was not challenged before it. It thereby offended the parties' right to be heard on that point. The majority in *Kirland* found that an earlier decision taken under dubious circumstances by an administrative official was valid, unless it was challenged. As such, it set aside the administrative body's decision to unilaterally withdraw the 'dubious decision' and held that such earlier decision regardless of how impugnable it may be, was a decision validly taken by an administrative official and remains valid until set aside by a court of law. An impugnable decision is not a 'non-decision' and cannot be ignored or wished away. So too, the resolution of August 2011 remains a valid administrative act until set aside. A subsequent decision based on that resolution is therefore valid for as long as that earlier decision remains extant.

[83] Having found that Council indeed exercised its discretion judiciously and further that the court a quo could not make a finding of invalidity in respect of the resolution of August 2011, the November 2020 decision based on the unchallenged August 2011 resolution should stand. Therefore, even if it is assumed that by accepting that the decision of November 2020 was invalid because the resolution of August 2011 on which it was based was equally invalid, the application of the hospital would in any event have failed as Council did not have the power to grant such permission. It is a question of competence of Council and therefore of the legality of its conduct upon which this appeal turns.

Cross-Appeal

[84] As regards the issue of security for costs, it is correct that the cross-appeal did not suspend the operation of any order and no security was required, but to the extent that it may have been required, condonation is granted.

[85] As Council's expert(s) effectively put in doubt the adequacy of the methodology employed by the hospital's expert in determining that the 'thing' is non-hazardous, a genuine dispute of fact had arisen which called for an application for referral to oral evidence at least on that limited issue. That was not done and the *Plascon - Evans* rule dictates that the court should in such circumstances accept the version of the respondent, which in this case was Council. The declaratory relief should therefore be dismissed with costs. In any event, having found as I did earlier, there will be no treatment done at the hospital's facility at least not until the August 2011 resolution is successfully challenged and therefore the declaratory relief, even if it was granted would have taken the hospital's case no further.

[86] Although it has been found that the hospital's application was brought in terms of a wrong regulation, Council indicated in its papers that the correct regulations for an application for permission to treat health care risk waste are regs 20 and 37. It would appear that the hospital is not bereft of a possible remedy. However, as far as its application to Council which forms the subject matter of this appeal is concerned, this is the end of the matter.

Costs

[87] As to the issue of costs, no reason was advanced and none has arisen why costs should not follow the event.

Order

[88] The following order is made:

- (a) The appeal succeeds with costs.
- (b) The court a quo's order is set aside and replaced with the following order—
 - '(i) The application is dismissed.
 - (ii) The applicant must pay the costs of the first respondent (Council), such costs to include the costs consequent upon the employment of one instructed and one instructing legal practitioner.'

- (c) Condonation for the late filing of the security for costs in the cross-appeal is granted.
- (d) The cross-appeal is dismissed with costs.

SHIVUTE CJ

MAINGA JA

MAKARAU AJA

APPEARANCES:**APPELLANT:**

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FIRST RESPONDENT:

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